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REPORTS OF CASES

HEARD AND DETERMINED

BY

THE JUDICIAL COMMITTEE,

AND

THE LORDS

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ON

APPEAL FROM THE SUPREME, SUDDER DEWANNY ADAWLUT AND HIGH COURTS OF JUDICATURE

IN

THE EAST INDIES.

BY EDMUND F. MOORE, ESQ.

VOL. X.

1863-6.

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ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

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1863-6.

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

MOHUN LALL SOOKOOL - - *Appellant,*

AND

GOLUCK CHUNDER DUTT, son of DABEE DOSS, deceased, and others } *Respondents.**

On appeal from the Sudder Dewanny Adawlut of Bengal.

30th Nov., 1863.

THIS suit was brought by the Appellant, a decree-holder under a sale of a Mortgagor's equity of redemption, to recover possession of lands held, as he contended, by the Respondents, as usufructuary Mortgagees, and who had repaid themselves the

The provisions of *Ben.* Reg. XXVI. of 1814, sec. 10, cl 3, directing the Court to record the points at issue, are imperative and must be strictly observed. Where, therefore, in a suit to recover lands in possession, as the Plaintiff alleged, of the usufructuary Mortgagees under a conditional sale, the substantial question raised by the answer was, whether certain foreclosure proceedings under *Ben.* Reg. XVII. of 1806, sec. 8, taken by the Mortgagees effectually barred the equity of redemption,

* Present: Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. Sir John Coleridge.

Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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principal money and interest out of the perception of the mesne profits. The Respondents' case was, that by certain foreclosure proceedings taken by them under *Ben.* Reg. XVII. of 1806, sec. 8, the equity of redemption was barred.

The facts of the case were as follow :—

In the year 1828, one *Lalla Tiluck Chunder*, deceased, mortgaged a *Zemindary* called *Seetadulput* (with the exception only of *droons* 33. 3. 15. 1 of land belonging to *Mouzah Jafferabad*, one of the villages), by way of conditional sale, to *Chuttro Narain*, *Ram Doss* and *Nilmoney Dutt*, to secure the repayment to them of the principal sum of Rs. 4,900, advanced to *Lalla Tiluck Chunder*.

This mortgage was effected through means of two written instruments, one being a *Bilawuz Heba*, or deed of sale, dated the 12th *Phalgoon* 1189 (1828 A.D.) which was executed by *Lalla Tiluck Chunder*, and by which he purported to sell to *Chuttro Narain*, *Ram Doss* and *Nilmoney Dutt*, for the consideration aforesaid, the entire *Zemindary*, with the exception of the 33 *droons*, &c., of *Mouzah Jafferabad*, in order that they might possess the same and enjoy the profits thereof. The other instrument, called an *Ikrar*, or deed of agreement, bore the same date, having been executed contemporaneously by the last-mentioned

but the Judge of the Court of First Instance did not record that point; upon appeal the case was remitted by the Judicial Committee to *India* with directions that the question of foreclosure should be tried upon an issue regularly settled.

Held further, that as the account of the mesne profits and expenditure by the Mortgagees in possession was unsatisfactory, an account, whether incidental to the question of foreclosure, or redemption, was to be taken, as provided by *Ben.* Regs. XV. of 1793, sec. 11, and I. of 1798, sec. 3.

If the interest of the Mortgagor in the mortgage estate has been sold under a decree, and the sale takes place before the notice to foreclose was filed, such notice, to be effectual, must be served on the purchaser, or decree-holder.

persons, who then delivered it in exchange for the deed of sale to *Lalla Tiluck Chunder*. This agreement, after reciting the before-mentioned deed, provided, that if the Mortgagor paid off the principal money at the termination of seven years, then the Mortgagees would return to him the deed, and deliver up the possession of the estate; and that if such money was not then repaid the agreement would be deemed of no effect, and the deed of sale remain valid.

It appeared that the Mortgagees in the first instance got possession of only a portion of the lands, and were driven to a suit to obtain possession of the remainder. The Mortgagees under a decree made in that suit entered into possession of the whole of the mortgage premises, and continued to receive the mesne profits thereof until the death of *Chutter Narain*, one of the Mortgagees, who died, leaving *Dabee Doss*, since deceased, and *Traheeram Dutt*, his sons and heirs-at-law, him surviving, who, together with the surviving Mortgagees, continued in possession.

Afterwards one *Bridreenath Bajpae*, the representative of a person who had obtained a decree in the Civil Court against *Lalla Tiluck Chunder*, the Mortgagor, and one *Augustine Penheiro*, who had become by purchase the decree-holder, issued out an attachment in execution of the same, and seized and attached the *Zemindary* in order to sell the lands and realize the amount due under that decree.

The usual proceedings in a summary suit were taken in the *Zillah* Court by the Mortgagees, who objected to such intended sale on the ground of their conditional purchase of the *Zemindary*. The Principal *Sudder Ameen* overruled their objection, and, by his proceeding of the 17th of *July*, 1850, ordered the

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sale to take place, giving notice at the time of the existence of the mortgage.

In the month of *September*, 1850, the Mortgagees served notice of foreclosure on the widow and heiress of the Mortgagor, insisting that as the principal money and interest was not paid the mortgage had became absolute.

On the 8th of *January*, 1851, an Order was made in the appeal by the Mortgagees in the summary suit, affirming the Order of the Principal *Sudder Ameen*. The estate was accordingly sold, in execution of the said decree, to the Appellant and one *Lalla Prosunno Lall* (since deceased) in equal undivided moities, for the sum of Rs. 4,300, which was paid by them in equal proportions.

After some proceedings before the *Foujdary* Court respecting the Mortgagees' possession, the suit out of which the present appeal arose was brought by the Appellant and *Lalla Prosunno Lall*, in the *Zillah* Court of *Chittagong*, against *Ram Doss*, since deceased, the Respondent, *Nilmoney Dutt*, *Dabee Doss*, and *Traheeram Dutt*, *Ronoo Debia*, as widow of the late *Lalla Tiluck Chunder*, and others. The plaint set forth the principal facts before-mentioned, and charged that such of the Defendants as were the Mortgagees, or their representatives, had been paid out of the mesne profits of the mortgage lands in their possession, the whole of the mortgage money and interest, and that accordingly the Plaintiffs were entitled to have possession of the estate as such purchasers under the decree as aforesaid; and prayed that an account might be taken by the Court, and that if it should then appear that the Mortgagees had received the principal and interest, the Plaintiffs should be decreed possession of the estate.

The answer of the Mortgagees stated, that they had not realized the amount of the mortgage money, and that up to that time the principal with interest due to them remained still unpaid; and admitting possession of the estate to have been obtained under the suit instituted by them, they alleged that, after allowing for expenditure, the interest of which was stated to amount to Rs. 588, per annum, on the mortgage debt, which had not been discharged, there was due to them Rs. 11,976. 9. 0. 2. The answer also stated, that the lands of *Mouzah Jufferabad* had not been attached and sold in execution of the aforesaid decree, and that portions of the other lands had been since washed away by the river. The Mortgagees also insisted that, having presented a petition to foreclose the mortgage, according to sec. 8 of *Ben.* Reg. XVII. of 1806, neither *Ronoo Debia* nor her representatives, the Plaintiffs, having paid off the mortgage debt, after the expiration of the one year of grace the foreclosure had become absolute, and that the suit was barred.

The answer of the Defendant, *Ronoo Debia*, after admitting the mortgage, denied the validity of the sale in execution and purchase under it, and asserted her claim, as widow representing the Mortgagor, to the mortgaged lands, and also submitted that no suit would lie until the principal and interest should be realized by the Mortgagees, which was not the case, and which she alleged would appear on taking the account.

The other Defendants filed formal answers.

On the 5th of *August*, 1853, the proceeding to record the issues in the suit, under *Ben.* Reg. XXVI. of 1814, section 10, was held by the Principal *Sudder Ameen* of *Zillah Chittagong*, when he recorded for trial the following issues:—First, what quantity of

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land of *Turruf Seetadulput*, after excluding the *Kharija* of *Seetuldan*, was purchased by the Plaintiffs in execution of the decree; and what quantity of land of the aforesaid *Turruf* in the survey was measured as being in the possession of the Mortgagees; and of what quantity of land, in accordance with the decision of the Civil Court, the Mortgagees obtained possession. Secondly, whether or no the lands of *Mouzah Jefferabad* were attached by the Plaintiffs and had come under their purchase. Thirdly, whether or no, the principal and interest due to the Mortgagees having been liquidated from the collections of the disputed land, the disputed land was entitled to release; and whether or no, objection having been raised by *Ronoo Debia* to the purchase of the Plaintiffs in reference to the sale made to *Augustine Penheiro*, the purchaser, having been made on the back of the decree, the said purchase was correct.

Evidence was entered into and an account filed by Plaintiffs, and another prepared by the *Ameen* of the Court, but it was urged that no true account of the mesne profits was filed by the Defendants, the Mortgagees. The Defendants, the Mortgagees, filed a copy of a notice to *Ronoo Debia*, purporting to have been issued and addressed to her from the office of the Civil Court of *Chittagong*, and to bear date the 26th of *September*, 1850, requiring her to pay the mortgage-money, or be foreclosed. This document was not proved, nor was the service of it either admitted on the pleadings or proved. No issue was recorded by the Principal *Sudder Ameen* to try either the authenticity of this document, or the fact or legal effect of the foreclosure.

On the 5th of *February*, 1855, the hearing took

place before the Principal *Sudder Ameen*, who made a decree on that date, dismissing the suit, on the ground that the debt due to the Mortgagees had not been discharged.

The Plaintiffs appealed against that decree to the additional Judge of the *Zillah* Court, and on the 21st of *April*, 1855, that Judge, by his decree, remanded the case for trial, upon certain directions which are not material to state.

On the 31st of *December*, 1855, the re-hearing of the suit came on before another Principal *Sudder Ameen*, and it was ordered that the Plaintiffs were entitled to recover possession of the *Mouzahs* specified in their deed of sale by cancellation of Defendant's Mortgage.

The Defendants, the Mortgagees, appealed against that order to the additional Judge of the *Zillah* of *Chittagong*. In the grounds of appeal they urged that the Plaintiffs could not sue for possession until they were proved to be the legal representatives of the Mortgagor; and that they, the Defendants, having presented a petition of foreclosure, agreeably to sec. 8, *Ben.* Reg. XVII. of 1806, the conditional sale had become absolute, and that they became the rightful owners of the lands in dispute.

On the 9th of *December*, 1857, the hearing of the appeal came on before *E. Radcliffe*, Esq., the additional Judge of the *Zillah* Court, who by his decree held that the mortgage was liable to cancellation, and the Plaintiffs entitled to the possession of the *Zemindary*.

The Defendants, the Mortgagees, presented a petition to the *Sudder Dewanny Adawlut*, praying for special leave to appeal, which Messrs. *Patton* and *Sconce*, two of the Judges of that Court, admitted.

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The hearing of the special appeal took place on the 14th of *February*, 1859, before Messrs. *Colvin*, *Trevor*, and *Loch*, three of the Judges of the *Sudder Dewanny Adawlut*, who reversed the decrees of the Lower Courts. The material part of their decree was in these terms: —"The appeal was admitted to try two points: first, that inasmuch as the Plaintiffs, within one year from the issue of the notice, did not discharge the debt, whether they did not, by such failure, lose their right to redeem? And, secondly, whether the Lower Courts have erred in extending the account of collections beyond the year of notice down to the date of decision? There can be no doubt, as stated in the remarks of the Judges who admitted the special appeal, that the Court below has erred in ruling that the Defendants have no right to foreclose, inasmuch as their case was struck off the file on the 4th of *January*, 1851, previous to the expiry of the year of grace. The Appellants issued notice of foreclosure on the 24th of *September*, 1850; and after everything necessary to be done by them had been done, the case was struck off the file on the 4th of *January*, 1851. This formal act has no effect upon the rights of the Mortgagor and Mortgagees. The Mortgagor, or his representative by purchase, must, within one year from the 24th of *September*, 1850, have paid every *pice* due under the mortgage, or on that date the sale became absolute; and looking to the second point, on which the special appeal has been admitted, we would observe that the account must be made up to that date only, and not to any subsequent period. *Macpherson*, on Mortgages in the *Mofussil*, pp. 213–214. With a view, however, of altogether getting rid of the effect of the notice, and non-pay-

ment under it, it has been urged that the decision of the Judge of *Chittagong*, dated the 30th of *September*, 1831, converted a transaction which was in the nature of a usufructuary conditional sale into a pure usufructuary mortgage. We have attentively perused that decision, and we find that there is not the slightest ground for this allegation, which is now mentioned for the first time. The Plaintiff in that case, the Defendant in this, sued for possession of the estate which had been mortgaged to him, to which he was, under the terms of the deed, entitled. The Court accepted the interpretation for which the Plaintiff contended, and declared him entitled to possession during the remainder of the term mentioned in the mortgage deed, or until the debt was paid, with interest. To this extent the Court acted; but as to the Court's converting a transaction of one nature into one of another, it neither had the power to do, nor did it, in fact, so act. It remains, then, for us to inquire whether, on the expiry of the year of grace, any sum remained due to the Mortgagees. It is, of course, quite competent to the Mortgagor or his representative, in a mortgage like that before us, to omit to make any payment during the year of grace; but this omission is at his own risk, and if one *pice* be on that date found to be due, the mortgage becomes irredeemably foreclosed and the conditional sale has become absolute. Now, looking to the accounts which have been accepted by the Courts below, and which we cannot now question on a special appeal, we find that on the last day of the year of grace a considerable sum, viz. Rs. 2,419, was due to the Mortgagees. Such being the case, we hold that the Plaintiffs have lost their equity of redemption and that the special appeal

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must be decreed, and the decisions of the Lower Courts be reversed, with costs; and that the Appellants, according to the account prepared by the *Khurchanuvees*, must receive from the Respondents the costs of this Court, together with interest from this date up to date of realization; and that for the costs of the *Zillah* Court they must prefer an application in the *Zillah* Court, from whence, in conformity with the Circular Order of the 4th of March, 1836, the necessary Order will be passed in regard to their payment."

The *Sudder* Court refused to admit an appeal to *England*, but special leave to appeal was granted by their Lordships, upon evidence that the real or market value of the subject-matter in dispute was of the value of Rs. 10,000 (*a*).

As the Respondents did not appear, the appeal was heard *ex parte*.

The Attorney-General (Sir *R. Palmer*) and Mr. *Leith*, for the Appellant, *Mohun Lall Sookool*,

Contended, that the *Sudder* Court's decree was erroneous:—First, as it was founded upon the alleged foreclosure proceedings, concerning which, though set forth in the pleadings, no issue had been recorded in the Court of the Principal *Sudder Ameen*, as required by *Ben.* Reg. XXVI. of 1814, sec. 10, *Maharajah Koonwur Baboo Nitrasur Singh* v. *Baboo Nund Loll Singh* (*b*), the provisions of which were similar to the *Mad.* Reg. XV. of 1816, sec. 10, *Srimut Mootoo Vijaya Raganadha* v. *Rany Anga Moottoo*

(*a*) See case reported upon this point, 8 Moore's Ind. App. Cases, pp. 193, 492.

(*b*) 8 Moore's Ind. App. Cases, 199.

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Natchiar (*a*); and upon which point it was not competent for either party to go into evidence.

Secondly, that the two former decrees of the Principal *Sudder Ameen* and additional *Zillah* Judge ought to have been affirmed; or the case remanded to the Lower Court, with directions that the Defendants in the suit should, under *Ben.* Regs. I. of 1798, sec. 3, and XV. of 1793, sec. 11, deliver in a true and correct account, on oath or solemn declaration, of their receipts and expenditure as Mortgagees in possession; and that an account should then be taken by the Lower Court in order to ascertain whether anything, and what, was due and owing to the Defendants in respect of the mortgage money and interest at the date when it is alleged the foreclosure proceedings, if valid, took effect. And

Thirdly, that the Defendants failed to prove either that they were entitled to foreclose the mortgage, or that, if so, the same was duly foreclosed in such manner as required by *Ben.* Reg. XVII. of 1806, sec. 8, as to operate as a bar to the Plaintiffs' right.

Judgment was delivered by

1st Dec. 1863.

The Lord Justice KNIGHT BRUCE :—

This appeal arises on a litigation which commenced, at the latest, in the year 1852, but in a sense earlier, on the question whether a mortgage continued subject to redemption; and if it did, what, if anything, was due upon it: a litigation that might and ought to have been less complex, less prolix, and less tedious than it has unhappily been. That there was a mortgage is plain; it may be taken also as equally plain

(*a*) 3 Moore's Ind. App. Cases, 278.

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that if it is redeemable, the present Appellants (for it may be considered that there are two Appellants) are the persons entitled to redeem, and that the Respondents are the actual Mortgagees in possession, who, if the mortgage is redeemable, are liable to be redeemed.

By two decrees, dated respectively the 31st of *December*, 1855, and the 9th of *December*, 1857, the latter being made on the appeal of the Mortgagees from the former, the Mortgagors' representatives (the Appellants) were not only declared entitled to redeem the mortgage, but were also declared entitled to do so without making any payment; and this on the ground that, as then decided, the Mortgagees in possession had fully paid themselves by receipt of rents and profits.

These *Zillah* decisions, the Mortgagees having been dissatisfied with them, led to a special appeal on their part to the *Sudder Dewanny Adawlut* at *Calcutta*, which Court in 1859 reversed them, upon the ground (which was in fact the only question before the Court on the special appeal) that certain proceedings taken by the Mortgagees with a view to foreclosure had effectually barred the equity of redemption, and, consequently, that the Appellants' suit ought to be dismissed with costs.

That led to the present appeal, in which the Appellants contend for the relief given to them by the decrees of 1855 and 1857, or at least for something less disadvantageous to them than the decree of 1859.

Upon the materials before their Lordships, their opinion is not in favour of the decrees of 1855 and 1857, or either of them, nor is it in favour of the decree of 1859. They conceive that the materials before the

Court which pronounced the decree of 1855, or before the Court which pronounced the decree of 1857, were not nor are sufficient, as to the matter of debt, to support either of those decrees; and that, on the other hand, the Court which pronounced the decree of 1859 was not, by the state of things then before it, enabled to make that decree.

Their Lordships consider that it did not appear sufficiently before the Court in 1855, or before the Court in 1857, that, on the assumption of the redeemable condition of the mortgage, there was not anything then due to the Mortgagees on their security.

The *Zillah* Courts, in coming to this conclusion as to the state of the accounts, seem to have proceeded not upon proof of the actual collections which were or ought to have been made by the Mortgagees, but upon materials which were in a great measure speculative and conjectural. And this objection to the mode of taking the accounts has in fact been taken by the Appellants' Counsel at their Lordships' Bar, when contending against the application by the *Sudder* Court of the account so taken to the question of foreclosure.

The other objections taken to the decree of 1859 are—first, that the *Sudder* Court ought not to have decided the cause on the question of foreclosure, because that question, though raised upon the pleadings, had not been made one of the issues settled in the Court of First Instance, where alone evidence could be taken; and, secondly, that the Court came to an erroneous conclusion in treating the proceedings of which there was any evidence as an effectual bar to the Appellants' right of redemption. Their Lordships consider both these objections to be well

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founded. It is clear that there has been no such trial of the question of foreclosure as the Regulation which prescribes the statement of formal issues, and indeed substantial justice, require. And in dealing with this question the *Sudder* Court seems to have directed its attention to the erroneous reasons assigned by the *Zillah* Judge for holding that no right of foreclosure existed rather than to the effect of the proceedings proved.

In *September*, 1850, when they filed their notice of foreclosure, the Mortgagees not only had notice that the interest of the original Mortgagor had been taken in execution, but were actively disputing in a summary suit the right of the decree-holder to put up that interest for sale. There had been a decision against their objection, and their appeal against that decision was pending. The appeal was decided against them on the 8th of *January*, 1851, and the equity of redemption was sold to the Appellants on the 7th of *April*, 1851. It is quite clear upon the authorities that, if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser; and, in the circumstances above stated, their Lordships conceive that it ought to have been served upon the decree-holder. Yet there is no evidence of any attempt to serve it upon any one except the widow and heiress of the original Mortgagor.

Their Lordships, therefore, think that the question of foreclosure ought to be further and fully tried upon an issue to be regularly settled; and that the mortgage account, whether as incidental to the question of foreclosure or to the question of redemption, ought to be properly taken. They desire, however,

to leave undisturbed the findings of the *Zillah* Courts upon the title of the Appellants to sue as the representatives of the Mortgagor, and upon the extent and nature of the lands which are the subject of litigation.

Their Lordships are of opinion, that each of the three decrees of 1855, 1857, and 1859 should be discharged, and that the cause should be remitted to *India*, and that the High Court at *Calcutta*, or, under its direction, the proper *Zillah* Court, should inquire whether the Appellants' right, or equity of redemption, as concerning the mortgaged estates in question, or any and what part of them, has become foreclosed or barred; and if it has not become so as to the whole of the estates, then to take an account of what, if anything, is due to the Respondents, or any of them, on the security, and for that purpose to take the usual accounts as to rents and profits and disbursements, with just allowances, and upon the result of that account to deal with the matters in dispute accordingly. The parties respectively to be at liberty to adduce evidence, in addition to that now before us, upon these issues, upon the determination of which the final decision of the cause must depend. The costs of the trial, including those of this appeal, to abide the event.

JOYKISHEN MOOKERJEE - - - *Appellant,*

AND

THE COLLECTOR OF EAST BURDWAN AND BRIJO ROY, Phareedar - - } *Respondents.**

On appeal from the Sudder Dewanny Adawlut at Calcutta.

15th & 16th Feb. 1864.

Chakeran lands in *Bengal*, held anterior to the Decennial Settlement, under the *Zemindar* of *Burdwan*, not merely in lieu of wages for personal services to the *Zemindar*, but also for the performance of the duties of village watchman, are not resumable as *Tannahdary* lands by the Government, under sec. 8, cl. 4 of *Ben.* Reg. I. of 1793, but are, by sec. 4 of *Ben.* Reg. VIII. of 1793, annexed to the *Malguzary* lands, and responsible for the public revenue assessed on the *Zemindary*.

Chowkeedars, or village watchmen, are liable to services to the *Talookdar*, but *Chakeran* lands held by them for such services are not liable to be resumed by the *Talookdar* for his own use discharged of the obligation to which they are subject. So held by the Judicial Committee, affirming the judgments of the *Zillah* and *Sudder* Courts, in a suit for resumption by the Appellant as *Talookdar*, under a purchase of certain lands from the *Zemindar* of *Burdwan*, which he alleged to be *Gram Surunjamee* (rent-free village lands), but which were proved to be *Chakeran* lands, appropriated to the maintenance of *Chowkeedars* in the *Talook* in which the lands were situate.

The right of appointing *Chowkeedars* belongs to the *Talookdar*, such officers being liable to the performance of services to the *Talookdar*: and as by usage in the *Zemindary* of *Burdwan*, *Chowkeedars* had been accustomed to render such services to the *Zemindar*, the *Chowkeedar* was held entitled to possession of the *Chakeran* lands under such tenure.

THE question raised in this appeal was the right of the Appellant, the *Talookdar* of *Mouzah Gobindopore*, to the possession of certain land within the limits of his *Talookdary*, included in the Decennial Settlement, which the Collector of *East Burdwan* insisted were, previously to and at the time of that Settlement,

* Present: Members of the *Judicial Committee*—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors:—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

Chakeran lands (lands set apart and appropriated as a remuneration for services), and had so continued up to the institution of the suit.

The Appellant's case was, that these lands were *Gram Surunjamee Chakeran*, or lands appropriated in lieu of wages as a remuneration for personal services rendered to the *Zemindar*, and that upon the cesser of such services he was entitled to take possession of such lands; while the contention on the part of the Respondent, the Collector of *East Burdwan*, was, that the lands were *Tannahdary*, or *Chowkeedary Chakeran*, or lands appropriated as remuneration for Police services, and that as such they were not resumable by the Appellant, as *Talookdar*, at all events, while the holder of the lands continued to perform the Police services.

The circumstances of the case and the nature of the tenure, were as follows:—

Prior to the Decennial Settlement the landholders, and *Sudder* Farmers of land, were bound by a clause in their engagements (*a*), to keep the peace, to prevent robberies, and arrest offenders; and for these purposes they retained in their service an establishment of *Tannahdars* (Police officers) and *Pykes* or *Chowkeedars* (village watchmen).

Mouzah Gobindopore, to which the lands in dispute belonged, was at the time of the Decennial Settlement a part of the large *Zemindary* of the *Rajah* of *Burdwan*; and the nature of the Police establishment of the *Zemindar* of *Burdwan*, in the year 1788, is referred to in the 5th Report of the Select Committee on the affairs of *India* in the following terms:—"His Police

(*a*) See Harington's Analysis, p. 459.

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establishment, as described in a letter from the Magistrate of the 12th of *October*, 1788, consisted of *Tannahdars*, acting as chiefs of Police divisions, and guardians of the peace; under whose orders were stationed in the different villages, for the protection of the inhabitants, and to convey information to the *Tannahdars*, about 2,400 *Pykes*, or armed constables. But, exclusive of these guards, who were for the express purpose of Police, the principal dependence for the protection of the people probably rested on the *Zemindary Pykes;* for these are stated by the Magistrate to have been in number no less than 19,000, who were at all times liable to be called out in aid of the Police" (*a*). The *Tannahdars* and *Pykes* were remunerated by the *Zemindar*, either by an appropriation of *Chakeran* lands or by a money payment, and in the calculation of the *jumma* of the *Zemindary* to be assessed, with a view to the Decennial Settlement, the profits of the *Chakeran* lands were not brought into account, and deductions were allowed in favour of the *Zemindar* for the charges for such *Pykes* as were paid in money, and the Decennial Settlement was carried into effect upon such a calculation (*b*).

Ben. Reg. I. of 1793, which declared the assessment of the Decennial Settlement fixed for ever, in the 4th cl., sec. 8, provided as follows:—"The *jumma* of those *Zemindars*, independent *Talookdars*, and other actual proprietors of land, which is declared fixed in the foregoing articles, is to be considered entirely unconnected with, and exclusive of, any allowances which have been made to them in the adjust-

(*a*) 5th Report, 1812, p. 71.

(*b*) Mr. Shore's minute, 1789, 5th Report, p. 198.

ment of their *jumma*, for keeping up *Tannahs*, or police establishments, and also of the produce of any lands which they may have been permitted to appropriate for the same purpose; and the Governor-General in Council reserves to himself the option of resuming the whole or part of such allowances, or produce of such lands, according as he may think proper, in consequence of his having exonerated the proprietors of land from the charge of keeping the peace, and appointed officers on the part of Government to superintend the Police of the country. The Governor-General in Council, however, declares that the allowances or produce of lands which may be resumed, will be appropriated to no other purpose but that of defraying the expense of the Police; and that instructions will be sent to the Collectors, not to add such allowances, or the produce of such lands, to the *jumma* of the proprietors of land, but to collect the amount from them separately."

By *Ben.* Reg. VIII. of 1793, which amended and enacted the rules for the Decennial Settlement, after declaring, in section 36, that the assessment was to fixed, exclusive and independent of all existing *Lakhiraj* lands, it was, in section 41, provided as follows: — "The *Chakeran* lands, or lands held by public officers and private servants in lieu of wages, are also not meant to be included in the exception contained in section 36 The whole of these lands in each Province are to be annexed to the *Malguzary* lands, and declared responsible for the public revenue assessed on the *Zemindaries*, independent *Talooks*, or other estates in which they are included, in common with all other *Malguzary* lands therein."

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In order to correct abuses arising from the *Zemindary* police establishments, and to afford more effectual protection to person and property, a new system of Police was established by the Government on the 7th of *December*, 1792, the rules of which, with amendments, were re-enacted in *Ben.* Reg. XXII. of 1793. That Regulation provided, that the Police of the country should thenceforward be considered under the exclusive charge of officers appointed by the Government, and that each *Zillah* should be divided into Police jurisdictions of a certain extent, each superintended by a *Darogah;* and by sec. 12 all the village watchmen were thereby declared subject to the orders of the *Darogah;* and, amongst other duties, by section 13, the Police *Darogahs* were directed to keep a register of the village watchmen declared subject to their orders; and, upon the death or removal of any of them, the landowners or others to whom the filling up of the vacancies might belong, were required to send the names of the persons whom they might appoint to the *Darogah* of the jurisdiction, that they might be registered by him.

For the more complete formation of the register of village watchmen, and to enable the *Zillah* and City Magistrates at all times to ascertain what number and descriptions of watchmen and guards were maintained in aid of the Police throughout their respective jurisdictions (*a*), it was enacted by section 21 of *Ben.* Reg. XII. of 1807, that "every landholder, farmer, merchant, or other person employing *Pykes, Chokeedars, Pasbans, Nigabans, Burkundazes,* or any other description of watchmen or guards, shall, within three

(*a*) See Harington's Analysis, p. 513.

months after the promulgation of this Regulation, transmit a list thereof, specifying the names, occupations, places of residence, and allowances in land or money, of the several persons entertained by them, to the Magistrate of the *Zillah* or City in which they were employed. They shall also transmit to the Magistrate a similar list in the first month of each succeeding *Bengal*, *Fusily*, or *Willaity* year (according to the era current in the district), made up to the last day of the preceding year. Any neglect to furnish such lists (especially after being called upon by the Magistrate), as well as any wilful omission to include in them persons actually employed as guards or watchmen, of whatever denomination, shall be liable to a fine to Government not exceeding Rs. 200, to be determined by the Magistrate, according to the situation of the party and circumstances of the case." The object of the above-stated section was subsequently further provided for by *Ben.* Reg. XX. of 1817, sec. 21.

It appeared that at about the time of the Decennial Settlement one *Srishteedhur* had possession of the lands in dispute as a remuneration for his services as *Tannahdar* in the establishment of the *Zemindar* of *Burdwan*, and, subsequently to the alterations in the Police system before referred to, he continued to hold the lands in the capacity of *Pyke*, or *Chowkeedar*, under the *Talookdar* of *Gobindopore*, who held that *Talook* in *putnee* (in perpetuity) of the *Zemindar*, and, as appeared from the Records of the *Foujdary* Court of *Zillah Burdwan*, he was returned as so holding in the lists transmitted to the *Zillah* Magistrate in conformity with section 21, of *Ben.* Reg. XII. of 1807. *Srishteedhur* died about the year

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1836, and *Nundololl Roy*, who was appointed to succeed him, entered into possession of the lands in dispute, and his name was entered in the Records of the *Zillah* Magistrate, as holding the lands in the capacity of *Phareedar* (village station policeman) of *Gobindopore*. Upon the death of *Nundololl Roy*, *Krishto Nayck* was appointed *Phareedar*, and entered into possession of the lands accordingly; and, upon the death of *Krishto Nayck*, in the year 1850, *Ahmed Buksh* was appointed, and entered into possession of the lands, and held the same in the year 1852, when the *Talook* of *Gobindopore* was purchased by the Appellant.

Shortly after the appointment of *Ahmed Buksh* as *Phareedar* of *Gobindopore* he was appointed by the Magistrate to discharge the duties of *Phareedar* at a neighbouring station, *Doloybazar;* and the Appellant having ascertained this circumstance when he entered into possession of the *Talookdary*, insisted that he had a right to dispossess *Ahmed Buksh*, and to take possession of the lands in dispute for his own purposes. Upon proceeding to take possession, however, the Appellant was resisted by *Ahmed Buksh*, and eventually, in 1855, he instituted a suit to enforce his alleged right, by filing his plaint in the *Moonsiff's* Court of *East Burdwan* against *Ahmed Buksh*, and the Respondent, the Collector. The material statements in the plaint were to the effect, that *Ahmed Buksh* from the time of Appellant's purchase had not been present to take care of the *Zemindary* Office of *Gobindopore* village, or to keep a watch, or do any other business, although he continued to hold the lands in dispute as *Chakeran* lands, and forcibly retained possession; that the lands were never held at any time as service lands

for *Tannahdary* (Police duties), and that it was not laid down by any Regulation that service lands for the village *Chowkeedars* must be given by the *Talookdars* or *Zemindars*; that the lands were *Gram Surunjamee* lands, of which the Appellant was owner, and that, by sec. 41 of *Ben.* Reg. VIII. of 1793, as such lands had been included in the settlement with the *Zemindar's* rent-paying lands, the Appellant was entitled to the lands as liable to pay rent to him; and the plaint prayed, that upon the *Zemindary* rights being established, he might be put in possession of the disputed land, containing 19 *beegahs* 1 *cottah* and 13 *chuttacks*, of the estimated value of Rs. 200, together with mesne profits, *pendente lite*, and interest until the time the amount of decree should be realized.

The Respondent, the Collector of *East Burdwan*, insisted that, by the records of the Criminal Court, it was manifest that *Srishteedhur* had possession of the land in dispute as *Phareedar* in the year 1813, and that his successors in that capacity had also held the land; that the land was never *Gram Surunjamee*, but *Chakeran* land for the performance of Police *Chowkeedary* duties, and had been held as *Chowkeedary Chakeran* land for forty-two years at the least, and was probably so held before the commencement of the Decennial Settlement.

The Appellant in his replication repeated his claim to the land as *Gram Surunjamee* land, and his title thereto, under *Ben.* Reg. VIII. of 1793, sec. 41, and contended that, inasmuch as the powers of the *Zemindar* of *Burdwan*, the original proprietor, with respect to the land, were then vested in him, the *Chakeran* land which the Defendant and his prede-

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cessors obtained for attending the *Zemindary* duties in lieu of salary, were then, since he did not perform the *Zemindary* business, liable to resumption by the Appellant. The replication also stated that *Deedar Buksh* had been appointed in the room of the Defendant, *Ahmed Buksh*, as *Phareedar* of *Doloybazar*, but that he did not attend to the *Chowkeedary* of the *Pharee* of *Gobindopore*, nor look after the *Zemindary* duties in any way.

In consequence of the appointment of *Deedar Buksh* he was made a Defendant to the suit in the place of *Ahmed Buksh*.

Issues were prepared on the part of the Appellant, and of the Respondent, the Collector, and after the same were settled by the *Moonsiff*, the parties proceeded to produce evidence in relation thereto. The Appellant gave in evidence a document purporting to be a copy of statement taken from the records of the Criminal Court of the year 1813, under the title of "A statement of the village of *Gobindopore*, in *Pergunnah Shahabad*, under the jurisdiction of *Tharra Koochut*," in which the *Tannah* was stated to be distant four miles from the village, and *Srishteedhur Tannahdar* was stated to hold 19 *beegahs* 17 *cottahs* (the land in dispute) as service land, and also certain other documents, which were principally copies of, or extracts from, correspondence between the Collector of *Burdwan* and other officers of the Government in relation to service lands within the district of *Burdwan*. Three witnesses were called by him to prove that *Srishteedhur Tannahdar* and his successors had never performed Police services, but had transacted *Zemindary* business solely, and on that account held the land in dispute.

The Respondent gave in evidence certain documents in relation to the Decennial Settlement concluded with the *Zemindar* of *Burdwan* in the year 1789, comprising the engagement of the *Zemindar*, and the *Dowl Bundobusts*, or particular statement of the *jumma* of the *Zemindary*, and of the net *jumma* payable in conformity with the settlement; and also other documents, consisting of copies of correspondence between the officers of the Government in relation to matters connected with the question in dispute.

On the 30th of *April*, 1856, the *Moonsiff*, relying upon the witnesses for the Appellant, found that the land entered in the statement, from the Criminal records of the year 1813, as in the possession of *Srishteedhur*, had been granted to him for *Zemindary* services solely, and that such land, being included in the Decennial Settlement, was rent-paying land; and after declaring his opinion, that as the *Zemindary* services were no longer performed the holder could not retain the land, he pronounced a decree, giving to the Appellant possession of the land, together with mesne profits, interest and costs.

The Respondent, the Collector, appealed to the Court of the Principal *Sudder Ameen* of *Burdwan*, and on the 7th of *December*, 1857, the Principal *Sudder Ameen* made a decree dismissing the appeal, with costs.

Application was made to the *Sudder Dewanny Adawlut* at *Calcutta*, for the admission of a Special appeal from the decision of the Principal *Sudder Ameen* in this suit and in other similar suits raising the same question; and on the 28th of *June*, 1858, such application was granted by the *Sudder* Court on the following grounds:—"These suits were instituted

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under the provisions of sec. 41, Reg. VIII., 1793, to resume certain lands held by the Defendant as *Chakeran*, on the plea that they were *Malguzary* lands assigned to the parties in possession for the performance of certain duties connected with the *Zemindary*, and that as these duties had ceased to be performed, the *Zemindar* was entitled to resume them. It is, however, admitted by the *Zemindar*, that the Defendants performed both *Zemindary* and Police duties, but for what period is not distinctly stated. The Government (one of the Defendants in these cases) pleaded that the lands were *Tannahdary* lands, assigned to the *Chowkeedars* for the performance of Police duties which they still continue to execute. It is not denied by the Defendant (special Appellant) that sec. 41, Reg. VIII., 1793, applies to these lands, but the Lower Courts, without determining the issue which arises out of the Defendants' pleadings, viz. whether the lands were or were not assigned for Police duties, have declared that the Plaintiff had authority to resume the land under the section quoted above. As this point has not been determined, the decisions are consequently imperfect; and as the *Zemindar* (the real Respondent in these suits) has appeared in this Court, we remand them for the trial of the following issues, which arise out of the pleadings:—First, what were the duties performed by the party in possession of these lands at, or antecedent to, the Decennial Settlement, or for a long series of years? Secondly, if the duties were wholly *Zemindary*, has it been proved that these duties have ceased, so as to entitle the *Zemindar* to resume? Thirdly, if the duties performed were partly *Zemindary* and partly Police, whether, on proof of the cessation of the *Zemindary*

duties, though the Police duties continue to be performed, the *Zemindar* can resume the lands?"

The suit accordingly came before the *Zillah* Court for trial upon the issues directed by the *Sudder* Court; and on the 17th of *November*, 1858, the Appellant presented a petition to the *Zillah* Court, stating that the Police station at *Doloybazar* had been abolished, and the Defendant, *Deedar Buksh*, discharged from his situation, and that *Brijo Roy* had been appointed *Phareedar* at the Police station at *Gobindopore*, and had taken possession of the disputed land, and praying that *Brijo Roy* might be made a Defendant.

The Respondent, *Brijo Roy*, was then made a Defendant by order of the *Zillah* Court, and put in an answer in the suit.

Additional evidence, both documentary and oral, was adduced by the parties. The evidence was contradictory. Two witnesses were examined on the part of the Appellant, who proved special services performed to the *Talookdar*, and that the land was held on condition of performing these services since the time of *Srishteedhur*. Amongst other documents given in evidence by the Appellant, was a copy of a statement of service land in *Tannah Koochut* for the year 1792, which purported to state that there were 104 *beegahs* of such land in *Pergunnah Shahabad* belonging to that *Tannah*. The Collector filed Reports of Officers of Government and list of the names of *Pykes* and of the *Chakeran* land held by them, including the name of *Srishteedhur*. Two other witnesses deposed that no service had ever been rendered to the *Zemindar* by the persons who successively held the lands in question.

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On the 29th of *July*, 1859, Mr. *C. Hobhouse*, the Judge of the *Zillah* Court, pronounced his judgment; and, as to the first issue, said:—"On a careful consideration of all the documents and papers, and of the *vivâ voce* evidence produced, and the laws quoted, Reg. XXII., 1793, and sec. 21 of Reg. XX. of 1817, by both parties, I am of opinion, that it has not been substantiated on the part of the Plaintiff, that the duties performed by the servants in occupation of the lands in dispute have been chiefly *Zemindary*, and only partly Police; nor, on the part of the Defendants, that the duties have been wholly Police; but that the duties, both before, at the time, and since the Decennial Settlement, have been partly Police and partly *Zemindary*, as follow:—*Zemindary*, first (personal to the *Zemindar*), to collect or enforce collections of rents; to guard *Mofussil* treasuries; and, perhaps, to escort *Mofussil* treasure. Second (common to the village community), to keep watch at night, to secure the harvests. Police—to maintain the peace; to apprehend offenders under orders of the *Tannahdars;* to report criminal occurrences; to convey public money to the *Sudder* treasury (this duty has ceased since the Decennial Settlement); to serve as guides to travellers. I may add, that it is notorious, and in my personal knowledge, that most of these duties are at this present time performed by the village watchmen in *Burdwan*." As to the second issue, the *Zillah* Judge referred to his opinion upon the first issue; and as to the third issue, the Judge stated his conclusion as follows:—"On the whole argument on this third issue my judgment is as follows: that the duties performed by the servants in possession of the lands in dispute have been proved

to be partly personal to the *Zemindar*, partly common to the village community and to the public generally, and partly special to the State; and that although the *Zemindar's* personal duties have ceased to be performed, yet that he has not thereby acquired any right to resume the lands. First, because of the fact that although the lands are included in the *Mal* estate, yet they are excluded from the rental paid under the permanent settlement, and the principle of equity which follows upon this fact, that the *Zemindar* cannot claim a something for which he has not given any equivalent; and, secondly, because of the fact that the conditions on which the lands were held were not wholly personal to the *Zemindar*, but were common to him, the village community, the public, and the State, and enjoyable by all *pro tempore Zemindars*, and because of the equity following on this fact, that he, the one of several parties having interests, present or possible, in the lands, should not have the power to resume and dispose of the lands at his own pleasure only." In accordance with the above-mentioned judgment, the *Zillah* Judge made a decree dismissing the suit with costs.

The Appellant appealed to the *Sudder Dewanny Adawlut*. The appeal came on for hearing before Messrs. *Raikes*, *Trevor*, and *Samuells*, three of the Judges of that Court; and on the 17th of *April*, 1860, the decree of the *Zillah* Court was affirmed by the judgment of the majority of the Judges, Messrs. *Trevor* and *Samuells* (the other Judge, Mr. *Raikes*, being dissentient), and a decree passed dismissing the appeal with costs.

Mr. *Trevor* (Mr. *Samuels* concurring) delivered the judgment of the *Sudder* Court, and declared, as

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to the first issue, that from the earliest periods there were *Tannahdary*, or *Chowkedary Chakeran*, but that with that description of service land the Court had no concern in the case before them; and that another and distinct species of service lands was called "*Zemindary Chakeran*," held by village watchmen, under the names of *Paiks* and *Pasbans*, and upon this issue expressed his opinion, that from a period antecedent to the Decennial Settlement, the lands in dispute had been held by parties on the condition of performing services both to the village community and to the *Zemindar*; and, as to the second issue, declared that, on the finding that the lands in dispute had been before, at, and since the Decennial Settlement, held on the condition of the performance of double service, viz. as village watch and *Zemindary Pykes*, it was competent to the *Zemindars* to resume the land on the tenant refusing to perform the duties of *Zemindary Pykes*. The decree then, amongst other things, dealing with the Decennial Settlement, declared as follows:—"The ownership of the soil was at the same time declared to be with the *Zemindars*, and it became necessary for Government to determine to whom the land held by the *Chowkeedars* and *Zemindary Pykes* belonged; with that object, by sec. 41 of Reg. VIII. of 1793, it was declared that 'the *Chakeran* land, or lands held by public officers and private servants in lieu of wages, are also not meant to be included in the exception contained in section 36,' which declares the assessment fixed, exclusive and independent of all existing *Lakhiraj* lands. The whole of these lands in each Province is to be annexed to the *Malguzary* lands, and declared responsible for the

public revenue assessed on the *Zemindary*, independent *Talooks*, or other estates in which they are included in common with all other *Malguzary* lands therein. The question then arises as to the meaning of this law. Does it at once absolutely transfer the lands to the *Zemindar*, and with the lands the right of doing with them as he pleases, and at once assessing them? or does it only transfer them to the *Zemindar* subject to all those burdens with which the Common law or custom has burdened them, so long as the public service or private convenience requires that they should be burdened? Unfortunately the law is silent on the point. It appears to me, however, that this important section only declares that the right of ownership in these lands is with the *Zemindar*; that though they are not a portion of lands on which the assessment was actually based, still they are to be annexed to those lands; and that when public service or private convenience no longer requires that they should be devoted to the purpose which, under the customary law, they have hitherto been devoted to, the right of resuming and assessing them is with the *Zemindar*, as owner of the estate in which they are settled. In carrying out this law in the case of *Zemindary Pykes*, no question could ever arise in the Courts. The *Zemindar* is alone the judge of the necessity of the retention of the services of his own servants, and he may dismiss them or retain them at his pleasure; but the case of village watchmen is different: their services are not personal to the *Zemindar*, but they are performed, first and mainly, for the village community; and consequently, as long as that community exists, the lands are liable to the charge of keeping up

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the watch. A letter of the Board, dated 13th *October*, 1790, has been cited by the Appellant, but that letter leaves the meaning of sec. 41, Reg. VIII. of 1793, just where it was." And, after other observations, the judgment concluded in these terms:—"Allusion has been made by the Judge, and also in this Court, to the deduction of Rs. 50,000, allowed to the *Rajah* of *Burdwan* at the Decennial Settlement, on account of *Nugdea Pykes*. Those *Pykes* were of a semi-military nature: were commanded by a European Officer, and kept up to guard the frontier from the incursions of the *Mahrattas*. The force is totally unconnected with the subject before the Court, and it consequently is unnecessary further to notice the circumstances connected with it. The foregoing remarks have indirectly met the chief arguments adduced by the Counsel for the Plaintiff. From what is there stated, it will appear that at the Decennial Settlement the service lands—both those of the village watch and the *Zemindary Pykes*—were not included in the assessment on which the Settlement was based, neither was any remission of revenue made in lieu of them; that appropriated as they were to particular purposes before the Decennial Settlement, so they remained after it; that, burdened with these charges, they were declared to be the property of the *Zemindar*; and though, in the case of *Zemindary Pykes*, the *Zemindar* can, at his pleasure, resume the lands, in that of the village watch he cannot; but that whilst the public service requires them, they must remain appropriated to those purposes. It follows, from this view, that the lands are burdened by the operation of law, and not by a private contract

between the *Zemindar* and the tenant *Chowkeedar*, and that, consequently, an unauthorized act of the latter can in no way justify the resumption of them by the former, as, under other circumstances, it might have been done."

The third Judge, Mr. *Raikes*, being dissentient, delivered a separate judgment, in which he stated at length his reasons for considering that the Appellant was entitled to recover possession of the lands, and that the decree of the *Zillah* Judge should have been reversed. The material part of his judgment was as follows:—" It has been admitted by the Government Pleaders, that where these services have been purely *Zemindary*, the practice (right or wrong) has been to resume, whenever the *Zemindar* chose to dispense with such services; but that, in the present case, as the occupant of the land has performed the duties both of a *Zemindary Pyke* and a village *Chowkeedar*, the *Zemindar*, in consequence of the village *Chowkeedar* being also a Police officer and a servant of the State, cannot resume the lands on a cessation of the *Zemindary* services. Now, I cannot allow that the village *Chowkeedar* is a Police officer, or a servant of the State. Section 13, Reg. XXII. of 1793, enacts, that 'All *Pykes*, *Chowkeedars*, *Pasbans*, *Dusauds*, *Negabans*, *Harees*, and other descriptions of village watchmen, are declared subject to the orders of the *Darogah*. He shall keep a register of their names; and upon the death or removal of any of them, the landowners or others to whom the filling up of the vacancies shall belong, shall send the names of the persons whom they may appoint to the *Darogah* of the jurisdiction, that they may be registered by him as above directed.' The next section describes the

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particular duties these men are expected to perform, and provides 'that *Pykes, Pasbans,* or other village watchmen, who shall not act in conformity with this section, shall be dismissed from the station by the landholders, or other persons by whom they are employed, upon the requisition of the Magistrate; and shall be further punished as the law may direct,' &c. These two sections appear to me to recognize in the plainest terms that these *Pykes, Pasbans,* or village watchmen, are servants of 'the landholders or other persons by whom they are employed,' and are not servants of the State. At page 44 of the Fifth Report of the Select Committee on the affairs of the East India Company, mention is made of the above Regulation in the following words:—'The *Pasbans, Pykes,* and other description of village guards, who still have their subsistence from the village establishment, are, by the Regulation then above cited, placed under the authority of the *Darogah,* who keeps a register of their names, and on a vacancy occurring in their number, calls on the *Zemindar*—to whom the privilege still appertains—to fill it up.' And again, at page 71 of the same Report, when treating of the Police under the system introduced in 1793, we find it stated, that 'the village watchmen, and such as remain undismissed of the *Zemindary* servants, are by the public Regulations required to co-operate with the *Darogah*; but a provision of this nature, without the means of prompt enforcement, has not been attended with the desired effect.' These extracts show that it was not the village watchmen only who were declared bound to obey the *Darogahs,* but all the *Zemindary* servants, as such; and if the argument be good, that a person who acts as *Zemindary*

servant, and as village *Chowkeedar*, and holds lands for these services, becomes through the above Regulation a Police officer and servant of the State, for precisely the same reason any other *Zemindary* servant must be a Police officer and servant of the State, and equally independent of the *Zemindar* who feeds and employs him, and remunerates him either with land or money. I feel no hesitation in coming to the conclusion, that when the persons here alluded to as village watchmen perform, as in the case before us, the duties of a *Zemindary Pyke* and of a village *Chowkeedar*, and hold land rent free, they are not Police officers of the Government, but servants of the *Zemindary* establishment, and the tenure of the land is a service tenure, that the occupant holds it, in lieu of wages, for services to be performed to the proprietor, and not, as alleged by the Government Pleader, exclusively for services rendered to the State, and for any services he may render to the community of the village; and, I believe, a separate charge may be legally made." And he concluded as follows:—"I have no hesitation in holding that the *Chakeran* lands, of which it is admitted the present lands form a part, were made over to the *Zemindars* as a part of their *Malguzary* lands, and that consequently any one who holds a portion of these lands without paying rents is bound to prove his right to do so. In the present case the Defendant justifies his right to rent-free occupation on the ground that he performs the duties of village *Chowkeedar*. But he has failed, in my opinion, to show that the lands were bestowed upon his predecessors for such services only; whereas I consider the Appellant has shown good ground to establish the belief that these lands were

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held exempt from payment of revenue, in consequence of the holder rendering services to the *Zemindar* in collecting the revenue, and that the exemption was not made in consequence of the protection he is supposed to afford to the village community. For that protection, I believe, as stated by Mr. *Brooke*, the community are bound to pay in *Burdwan* as well as in other parts of the country. Hence I am of opinion that, on failure of the services which the *Chowkeedar* Defendant was bound to render to the *Zemindar*, and of which the Appellant was most arbitrarily and illegally deprived by the Commissioner of Police, the Appellant is entitled to resume his tenure; and I would reverse the judgment of the lower Court accordingly."

As the value of the subject-matter in dispute was under the prescribed amount, Rs. 10,000, the Appellant petitioned Her Majesty in Council for special leave to appeal against this decree; and, in consideration of the important question at issue, and also that other suits were pending involving the same point, leave to appeal was granted (*a*).

Mr. *Rolt*, Q.C., and Mr. *Leith*, for the Appellant.

This case is of considerable importance, as the decision in this appeal will govern a great many other suits in which the Government of *Bengal*, *Zemindars*, *Talookdars*, and rent-free holders are interested. Our broad proposition is, that the land in question was always an integral portion of the *Malguzary* land, within the *Talook* of the Appellant, and held on a service

(*a*) See case reported on this point, 8 Moore's Ind. App. Cases, p. 265.

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tenure; in respect of which *Talook*, Government revenue was assessed at the Decennial Settlement, and covered by that Settlement, as *Gram Surunjamee*, by the predecessors of the second Respondent, on a personal service tenure to the *Talookdar* for protection of the *Zemindary* by performance of certain duties. *Raja Lelanund Sing Bahadoor* v. *The Government of Bengal* (*a*). The *onus*, that the second Respondent was entitled to continue in possession of the land without payment of rent, or rendering service to the Appellant, lay upon the Respondents, who claim the exemption, *Maha Raja, Dheeraj Raja Mahatab Chund Bahadoor* v. *The Bengal Government* (*b*). But the Government rested their defence on the allegation that the land was at the time of the Decennial Settlement, *Tannahdary Chakeran*, or Police service lands, within the meaning of *Ben.* Reg. I. of 1793, sec. 8, cl. 4, yet the decree of the *Sudder* Court declared that it was not of that tenure, but *Zemindary Chakeran*, or service land, and the property of the Appellant, as *Talookdar*, under *Ben.* Reg. VIII., 1793, sec. 41, and had been so held since the Decennial Settlement, on condition of performing services both to the village community, as village watchmen, and to the *Talookdar*. If so, and as the land was *Zemindary Chakeran*, and the second Respondent had failed to perform the conditional personal service to the *Talookdar*, on which the same was held, the Appellant, having been arbitrarily deprived of those services, ought to have been declared by the decree, under the last-mentioned Regulation, entitled to resume possession

(*a*) 6 Moore's Ind. App. Cases, p. 101.
(*b*) 4 Moore's Ind. App. Cases, p. 466.

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of the lands. The Government really had no interest whatever in the matter.

Mr. *Forsyth*, Q.C., and Mr. *W. H. Melvill*, for the Respondent, the Collector of *East Burdwan*.

The Appellant failed to make out his case, and he had no right to take possession of the lands in question, such lands having always been appropriated and held as remuneration for services which were wholly or in part Police duties, and not solely personal service to the *Zemindar*, and if those services were discontinued the Appellant had no right to resume the lands. On account of the nature of the services, no assessment in respect of the *jumma* of the lands was made at the time of the Decennial Settlement. Upon the nature of the tenure in dispute they referred to the 5th Rep. of Select Com. on the affairs of *India*, in 1812, pp. 44, 71, 198, 317, 319, 404-6; *Wilson's* Glos., *voce.* "*Pyke*," and "*Parik*," pp. 388, 591. *Harrison's* Analysis, p. 513. *Ben.* Regs. I., 1793, sec. 8, cl. 4; VIII., 1793, secs. 36, 41; XXII., 1793, secs. 1, 13; XII., 1807, sec. 1; XX., 1817, sec. 21.

5th May, 1864.

The consideration of the appeal was reserved: judgment was now delivered by

The Right Hon. Lord KINGSDOWN.

The question in this case relates to a small quantity of land, consisting of nineteen *beegahs* and some *cottahs*, in the *Talook* of *Gobindopore*. This *Talook* originally formed part of the great *Zemindary* of *Burdwan*,

and previously to its purchase by the Appellant it had been granted in *Putnee* by one of the *Rajahs* of *Burdwan*. In the year 1852 it was put up to sale by the Collector of the *Zillah* of *East Burdwan*, under the provisions of *Ben.* Reg. VIII. of 1819, in order to realize the amount of arrears of rent due from the then *Putneedar*. The Appellant became the purchaser, and entered into the receipt of the rents and profits of the *Talook*, and it must be assumed that, as *Putneedar*, he became entitled to the same rights in the subject-matter of the suit which were enjoyed by the *Zémindar*.

At this time the lands now in dispute were in the possession of a person named *Ahmed Buksh*, who paid no rent for them either to the Government or to the *Talookdar*, but, instead of rent, performed certain services. What was the nature of those services is one of matters now in question. Another is, what is the character of the lands thus held by these services; are they legally appropriated for the performance of these services, or are they lands which are the free and absolute property of the *Talookdar*, and which he is at liberty to resume and dispose of as he may think fit, either dispensing altogether with the services, or providing from other sources for the performance of these services if he be under any obligation to secure their performance?

On the 11th of *January*, 1855, the plaint in the present suit was filed, and the Collector of *East Burdwan*, as representing the Government, was made a Defendant. The plaint insisted that the lands in question were part of the *Talook*; that the lands were what are called "*Mâl Surunjamee*" or "*Gram Surunjamee*" held for the performance of services personal to the

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Zemindar, and for the protection of his property; that *Ahmed Buksh* had ceased to perform any *Zemindary* services; and that the Plaintiff had appointed another person to perform such services, and was entitled to resume possession of the lands.

On the 9th of *January*, 1856, the Collector of *East Burdwan* filed his answer, and he thereby insisted, "that the land in question was not *Mál Surunjamee* (service land for taking care of the *Mál* or *Zemindar's* property), but *Chakeran* land for the performance of Police or *Chowkeedary* duties; that the land being *Chowkeedary Chakeran* land, the *Zemindar* has no power to interfere with the property as long as the Policemen carry out their various duties."

The main issue raised between the parties, therefore, was as to the nature of the tenure on which the land was held: the contention on the part of the Appellant being that they were of one description and subject to the performance of no Government services, and the contention of the Respondent that they were of another description and subject to the performance of no services to the *Zemindar*. Shortly before the Collector put in his answer, the *Foujdary* Court of *East Burdwan* had issued an order "that a *Perwannah* be sent to all the *Darogahs* of this jurisdiction, that the *Chowkeedars* under their control be instructed not to attend to *Zemindary* duties."

It appears that these *Zemindars* were entrusted, previously to the British possession of *India*, as well with the defence of the Territory against foreign enemies, as with the administration of law and the maintenance of peace and order within their district; that for this purpose they were accustomed to employ not only armed retainers to guard against

hostile inroads, but also a large force of *Tannahdars*, or a general Police force, and other officers in great numbers, under the name of *Chowkeedars*, *Pykes*, and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the *Zemindar*, the collection of his revenue, and other services personal to the *Zemindar*.

All these different officers were at that time the servants of the *Zemindar*, appointed by him and removable by him, and they were remunerated in many cases by the enjoyment of land rent free or at a low rent in consideration of their services.

The lands so enjoyed were called *Chakeran* or service lands. These lands were of great extent in *Bengal* at the time of the Decennial Settlement, and the effect of that Settlement was to divide them into two classes:—

First. *Tannahdary* lands, which, by *Ben.* Reg. I. of 1793, sec. 8, cl. 4, were made resumable by the Government; the Government taking upon itself the maintenance of the general Police force and relieving the *Zemindar* from that expense.

Second. All other *Chakeran* lands, which by *Ben.* Reg. VIII. of 1793, sec. 41, were, whether held by public officers or private servants, in lieu of wages, to be annexed to the *Malguzary* lands, and declared responsible for the public revenue assessed on the *Zemindars'* independent *Talooks* or other estates, in which they were included in common with all other *Malguzary* lands therein.

It is clear upon the evidence, and in fact was not disputed at the Bar, that the lands in question are *Chakeran* lands of the second class, and it follows

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that, if resumable at all, they are resumable by the Appellant; and secondly, that if the services on which they are held are Police services at all, they are the services of *Chowkeedars*, or village watchmen.

The *Zemindar* had an interest in the performance of the duties of the village watchmen, inasmuch as they protected his property; but the public also had a great interest in their maintenance, and in the peace and good order which they were employed to preserve, and the Government, as representing the public, reserved therefore a strict control over them.

Accordingly, various Regulations were passed for the purpose of enabling the Government to effect this object. Registers were required to be kept of the different persons filling these offices in each *Zemindary*, with a statement of the funds allotted for their support. The officers themselves were made subject to the orders of the *Darogah*, or Superintendent of the Police of the District. The *Zemindar* was required to remove them on complaint of their misconduct by the *Darogah*, and, finally, they were made removable by the Magistrate on sufficient cause. But we can find nothing in these Regulations which takes from the *Zemindar* the right of nomination of these officers, or which deprives him of the power of himself removing them and appointing other fit persons in their stead, and nothing which deprives him of the right of requiring from the *Chowkeedar* such services as he was bound by law or usage to render to the *Zemindar*. It might well happen that, either by long usage or by the original contract, when the lands were granted, the village watchman might become liable, in addition to his Police duties, to the performance of other services personal to the *Zemindar*, as

the collection of his revenue and the like. Indeed, the rules laid down for the Decennial Settlement appear to us to recognize the interests both of the *Zemindars* and the public in lands of this description. They were not to be included in the *Malguzary* lands for the purpose of increasing the *jumma*, because the *Zemindars* had not the full benefit of them; but they were to be included in the *Malguzary* lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest.

Such being in our opinion the general law, let us look at the facts of this particular case. It is found by the *Zillah* Judge (*a*) that the duties performed by the persons in possession of these lands, both before and since the Decennial Settlement, have been partly Police and partly *Zemindary*, as follows:—*Zemindary:* First (personal to the *Zemindar*). To collect or enforce collection of rents; to guard *Mofussil* treasuries, and perhaps to escort *Mofussil* treasures. Second (common to the village community). To keep watch at night, and to secure the harvests. Police: To maintain the peace; to apprehend offenders under the orders of the *Tannahdar;* to report criminal occurrences; to convey public money to the *Sudder* Treasury, (this duty has ceased since the Decennial Settlement); to serve as guides to travellers. The Judge adds:—"I may add that it is notorious, and in my certain knowledge, that most of

(*a*) See *ante*, p. 28.

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these duties are at this time performed by the village watchmen in *Burdwan*."

From this finding their Lordships see no reason to dissent.

But it may well be that although these lands have been held by the predecessors of the Defendant, *Ahmed Buksh*, and were held by him as *Chowkeedar*, liable to perform services to the public as well as to the *Zemindar*, yet that there has been no legal appropriation of the land for that purpose, and that the Appellant may be entitled to recover the land, though he may be under an obligation to provide for the performance of such services as a *Chowkeedar* is liable to perform for the public.

The evidence appears to stand thus:—

At the time of the Decennial Settlement, though these lands were included in the *Zemindary*, their annual value does not seem to have been taken into account in fixing the *jumma*. This is consistent at least with the hypothesis that they were then appropriated to the payment of some officers whom it would be necessary for the *Zemindar*, either for his own or for the public interest, to maintain. We find that in 1813, the particular lands in question were in this *Talook* held by *Srishteedur*, who is described as *Tannahdar*, and they appear ever since to have been held by persons succeeding him in the same character. They were not held as *Tannahdary* lands in the strict sense of the expression—lands of that description had already been resumed by the Government — but as *Chowkeedary* lands: lands appropriated to the maintenance of an officer who performed, and was liable to perform, duties as a village watchman. We think that these circum-

stances are sufficient to warrant the inference that the lands in question were at the time of the Decennial Settlement appropriated, and still are liable, to the maintenance of such an officer, and that the *Talookdar* has no right to take possession of them for his own purposes, and hold them, discharged of the obligation to which they are subject.

On the other hand, it is established by the evidence that the *Chowkeedars* in this district have always been accustomed to perform services personally to the *Zemindar* as well as to the Police. This is distinctly stated to be the fact by Mr. *Skipwith*, the officiating Collector in 1837, and by the Judge of the *Zillah* Court in the present case, and it is admitted by the Government. We think, therefore, the order of the *Foujdary* Court in *December*, 1855, forbidding the performance of *Zemindary* services by the *Chowkeedar*, was without any warrant in law.

Cases of this description must, as it seems to us, depend mainly if not wholly for their decision upon the question, what was the tenure or character of the lands at the time of the Decennial Settlement, and how they were dealt with in that settlement.

In this case the result, in our opinion, is, that both parties have insisted on more than they were entitled to. One side has contended that the holder of these lands is liable to the performance of none but *Zemindary* duties; the other, that he is liable to the performance of none but Police duties.

Under these circumstances, we feel considerable difficulty as to the course which we ought to take. If we advise the affirmance of the judgment, we may seem to countenance the opinion that the Government has the right to take possession of these

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lands, and to appoint a person to perform, as *Chowkeedar*, general Police duties, to the exclusion of duties to the *Talook* and the *Talookdar*; and this is very far from being our opinion.

On the other hand, we think that we cannot advise the reversal of the judgment, having regard to the form of the pleadings, without maintaining the position assumed by the Appellant, that these are *Gram Surunjamee* lands, not liable to the performance of any but personal services to the Appellant; and from this opinion also we dissent.

The state of the pleadings prevents us from reaching the real merits of the case. It is not for us to say how these merits may best be reached. It may be that the Appellant having appointed a fit person to discharge the duties of village watchman, and to perform the duties personal to himself, may be entitled to recover the land for the purpose of its being held by the person so appointed, or it may be that the person so appointed may himself be entitled to recover the land. On these points we give no opinion. But on the whole, having regard to the Appellant being Plaintiff in the suit, and having failed to make out the case which he set up, we think that we shall best discharge our duty by humbly advising Her Majesty to affirm the judgment complained of, but without giving any costs, and to declare that the lands in question are to be considered as appropriated to the maintenance of a *Chowkeedar* or village watchman in this *Talook*, and that the right of appointing such officer belongs to the *Talookdar*, and that such officer is liable to the performance of such services to the *Talookdar* as, by usage in the *Zemindary* of *Burdwan*, *Chowkeedars* have been

accustomed to render to the *Zemindar*, and to declare that the affirmance of the judgment is to be without prejudice to any (if any) other suit which the Appellant may think fit to institute in respect to the matters in dispute in this cause.

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THE ZEMINDAR OF RAMNAD - - *Appellant,*

AND

THE ZEMINDAR OF YETTIAPOORAM - *Respondent.**

On appeal from the Sudder Dewanny Adawlut at Madras.

27th & 28th June, 1864.

Disputes respecting the boundaries of the *Zemindaries* of *Yettiapooram* and *Ramnad*, in the District of *Madura*, having led to acts of violence by the *Ryots*, the Government, in the year 1836, to preserve the public peace, attached the disputed lands and took possession for the benefit of the party to whom the lands should be judicially awarded. At and before the time of the Government taking such possession, the *Zemindar* of *Yettiapooram* was in possession of certain lands adjacent to and taken as a part of the lands in dispute The lands remained under attachment by Government for a period of nearly twenty years; no steps having been taken regarding them till the year 1855, when the *Zemindar* of *Yettiapooram* brought a suit

IN this appeal the question was one of boundary, involving an issue whether certain lands which had been taken possession of by the Collector of *Madura*, to await a judicial decision upon the title thereto, the subject of the suit, belonged to the *Zemindary* of

* Present: Members of the *Judicial Committee*—The Right Hon. Lord Kingsdown, the Master of the Rolls (the Right Hon. Sir John Romilly), and the Right Hon. Sir John Taylor Coleridge.

Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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Ramnad, or to the *Zemindary* of *Yettiapooram*. Disputes respecting the boundaries of these *Zemindaries*, and suits respecting it, had taken place between the *Zemindars* anterior to the institution of the present suit.

The circumstances of the case were these:—

The *Zemindary* of *Yettiapooram*, in the district of *Tinnevelly*, was bounded on the north and east by the *Zemindary* of *Ramnad*, in the district of *Madura*. The village of *Budalapuram*, and another village in *Yettiapooram* upon the north, join the village of *Paralachi*, in *Ramnad*; and the village of *Mavaliodai*, and two other villages in *Yettiapooram* upon the east, join the village of *Perunali*, in *Ramnad*. The lands in question in this appeal were the northern lands alleged by the Respondent as belonging to *Yettiapooram*, in the village of *Budalapuram*, adjoining the village of *Paralachi*, in *Ramnad*. Prior to the year 1819, such lands in question, which were mostly uncultivated, were in the possession of the *Zemindar* of *Yettiapooram*, and portions thereof were from time to time brought into cultivation by the *Ryots* of *Budalapuram*, and cultivated by them as being within the limits of that village. In that year a representation was made to the Collector of *Madura* by the *Tahsildar* of *Ramnad*, to the effect that the *Ryots* of *Budalapuram* had encroached upon lands to the extent of 550 *kurukhams* attached

against the Collector of *Madura* and the *Zemindar* of *Ramnad*, to recover possession of the land so formerly occupied by him, and for the mesne profits thereof while in the possession of the Government. Although no clear title in this suit was proved by either *Zemindar*, it was held by the Courts in *India* and affirmed on appeal by the Judicial Committee, that the fact of possession of the lands by the *Zemindar* of *Yettiapooram* before and at the time of the attachment by the Government was, in the circumstances, evidence of title, and the Government was ordered to restore the lands to him.

to the village of *Paralachi*, and were proceeding to cultivate them; and upon that representation being communicated by the Collector of *Madura* to the Collector of *Tinnevelly*, the last-mentioned Collector, on the 26th of *January*, 1819, issued orders to the *Zemindar* of *Yettiapooram*, directing him to investigate the matter and to submit a report thereon. An investigation was accordingly made, and the result of the inquiry was that the lands in question in this appeal remained in the possession and enjoyment of the *Zemindar* of *Yettiapooram*. It appeared that the *Ryots* of *Budalapuram* proceeded to bring into cultivation divers waste portions of the lands in question, and in the month of *January*, 1825, a complaint was made to the Collector of *Madura*, by the *Ameen* of *Talook Kamudai*, the *Talook* of *Ramnad*, in which the village of *Paralachi* is situated; that the *Zemindar* of *Yettiapooram* had encroached upon 2,000 *kurukhams* of land attached to *Paralachi*; and upon such complaint being made known to the Collector of *Tinnevelly*, he deputed a native Officer attached to his collectorate to proceed to the spot, and hold an inquiry into the matter, and ordered the *Zemindar* of *Yettiapooram* to send an authorized *Vakeel* to give evidence and information before such native officer. Orders were given to the people of the *Zemindary* of *Ramnad* to be present upon the spot on the day of the inquiry. The native Officer deputed to hold the inquiry arrived at the village of *Budalapuram* on the 30th of *March*, 1825, and on the following morning, in company with the *Vakeel* of the *Zemindar* of *Yettiapooram*, proceeded to the lands which were the subject of the complaint. No person connected with the *Zemindary* of *Ramnad* attended, and,

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after investigation, a report was made by the Officer, that the lands within the boundaries specified were under the enjoyment of the *Zemindar* of *Yettiapooram*.

In the year 1829, *Ramasami Setupati*, the *Zemindar* of *Ramnad*, the late husband of the Appellant, preferred another complaint to the Collector of *Madura*, against the *Zemindar* of *Yettiapooram*, stating that the inhabitants of *Budalapuram* had encroached upon 3,000 *kurukhams* of land lying within the limits of *Paralachi*, and also that the inhabitants of *Mavaliodai* had encroached upon 4,000 *kurukhams* lying within the limits of *Perunali*.

It appeared that arrangements were made by the Collector of *Madura* for the settlement of the disputes between the villagers of *Mavaliodai* and *Perunali*, and with respect to the lands in dispute within the villages of *Budalapuram* and *Paralachi*, which were alone in question in this appeal, and that the Collector of *Madura* had sent a letter to the *Zemindar* of *Ramnad*, stating that arbitrators had been named by the *Zemindar* of *Yettiapooram*, who would be upon the lands in dispute on a certain day, and directing the *Zemindar* of *Ramnad* to name arbitrators who should attend on his behalf on that day; but he neglected to send such arbitrators, consequently no final settlement was effected.

In the year 1834, proceedings were had with respect to the lands in dispute between the villages of *Mavaliodai* and *Perunali*, and such proceedings resulted in an award being made by Mr. *Blackburne*, the Collector of *Madura*, on the 23rd of *August*, 1834, which awarded the lands to the extent of 4016 *kurukhams* to belong to the *Zemindary* of *Ramnad*, and, in accordance with

such award, boundary stones were fixed between the eastern side of the *Zemindary* of *Yettiapooram* and the *Zemindary* of *Ramnad*. The *Zemindar* of *Yettiapooram* was dissatisfied with Mr. *Blackburne's* award, and after divers proceedings in the Courts in *India*, was successful in getting the same set aside by a decree of the *Sudder* Court. That decree, however, was reversed upon appeal by the Judicial Committee, who made an order maintaining the award (*a*).

Shortly after the award of 1834, in favour of the *Zemindar* of *Ramnad*, the claim to the lands in question, which were not affected by such award, was again set up, and the disputes between the *Ryots* of the villages of *Budalapuram* and *Paralachi* assumed so formidable a character that steps were taken, at the end of the year 1835, with a view to the attachment of the lands by the Government, and in the month of *January*, 1836, the Collector of *Madura*, under instructions from the Board of Revenue, attached and entered into possession of the lands, in order that the public peace might be preserved.

At the time of the attachment by the Collector, the *Zemindar* of *Yettiapooram* was, as he had been before, in the possession of the lands in question. The lands remained under attachment for a period of about twenty years prior to the institution of the suit in which this appeal was brought, and the rents were paid into the Collector's treasury.

On the 5th of *March*, 1855, *Jagaveera Rama Venkataswara*, the then *Zemindar* of *Yettiapooram*, and the father of the Respondent, filed his plaint in the Civil Court of *Madura* against the Collector of *Madura*, and the Appellant, the widow of *Ramasami*

(*a*) See case reported, 7 Moore's Ind. App. Cases, 441.

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Setupati, deceased, whereby, after stating the boundaries of the lands, and generally to the effect that the same belonged to the *Zemindary* of *Yettiapooram*, and that his possession thereof had been interfered with, the Plaintiff prayed that the Court would put the lands in his possession, and recover for him from the Defendants the amount of *tirva* of the lands collected during the twenty years of attachment.

The Collector, by his answer, stated that the surplus profits of the lands claimed, after deducting necessary expenses, amounted to Rs. 6,096. 8. 2, and that he was ready to pay that amount, and to give up the lands to the party in whose favour the Court might give judgment; and it was submitted that, as the attachment was made solely in order to preserve the public peace, one of the *Zemindars* ought to pay his costs of the suit.

The answer of the Appellant, in substance, was, that the lands did not appertain to the Plaintiff's *Zemindary*, nor were they enjoyed by him; that the lands were in the Appellant's enjoyment, as could be proved by evidence; that the lands were marked off from the Plaintiff's *Zemindary* by *Uranis* (tanks), dug as boundary marks by the people of *Ramnad*; that the disturbances were caused by the Plaintiff, who, in the year 1819, and again in 1832, neglected to send arbitrators to the lands in dispute. That, amongst other documents, to show that the lands appertained to *Paralachi*, there were particulars of an attachment by the Court, and also a Bill of sale at auction of certain of the lands as part of that village.

The Plaintiff in his reply, so far as respected the answer of the Appellant, pleaded, that the lands sued for did not appertain to *Paralachi*, and that they were

never enjoyed by the *Zemindar* of *Ramnad*, but were in the enjoyment of the *Zemindar* of *Yettiapooram* up to the time of the attachment; that the *Uranis* were not dug by the *Zemindar* of *Ramnad* as boundary marks; that the disturbances were caused by the *Zemindar* of *Ramnad*, and that it was the fault of that *Zemindar* that the dispute had not been settled by arbitration; and denied that the particulars of the attachment and the Bill of sale, upon which reliance was placed in the Respondent's answer, were of use in support of his case.

The following points for proof were recorded by the Judge of the Civil Court of *Madura*. The Plaintiff to prove his right to the lands mentioned in the plaint, and his enjoyment thereof, either at the time of their attachment by the Government in 1835, or for any period immediately preceding it. The second Defendant to prove her right to the lands mentioned in the plaint, and her enjoyment thereof, either at the time of their attachment by the Government in 1835, or for any period immediately preceding it. The first Defendant (the Collector) to prove that he is bound to make good to the party obtaining a favourable judgment the balance of the mesne profits collected during the time of the *Circar* attachment, and no further sum.

The Plaintiff's case was established by the production of attested copies of documents in the records of the Collectors of *Madura* and *Tinnevelly*, which comprised the communications and documents relating to the disputes in the years 1819, 1825, and 1829, hereinbefore referred to, and also a copy of a *Punchayat* decree, dated the 24th of *May*, 1784,

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awarding the lands within the disputed boundaries to the *Zemindar* of *Yettiapooram*. The Appellant tendered, among other documentary evidence, divers *Cadjan* measurement and other accounts alleged to relate to the lands in question, but they were rejected by the Civil Court as being unauthenticated, and there being no proof as to their genuineness.

Several witnesses were examined, and a plan showing the lands in question, and also the lands on the eastern side of *Yettiapooram*, which were awarded to the *Zemindar* of *Ramnad* by Mr. *Blackburne*, in 1834, and marked off by boundary stones placed by him, as hereinbefore mentioned, was called for by the Civil Court. From an inspection of that plan it appeared that the boundary stones were so placed as to mark off the eastern lands awarded to *Ramnad* from the lands in question which belonged to *Yettiapooram*.

On the 30th of *July*, 1860, the suit came on for final hearing before Mr. *R. R. Cotton*, the Judge of the Civil Court, and that Court made the following decree:—"That the first Defendant (the Collector) do make over to the Plaintiff the land in dispute and under attachment, together with the net revenues of the same, in deposit, from the time it was taken possession of by the Government to the present date; and that the second Defendant (the Appellant), as the admitted originator of the attachment and consequent cause of this action, do pay her own and first Defendant's costs, as well as those of Plaintiff, on the amount decreed." In giving judgment, the Civil Court stated that, in addition to the documents tendered as evidence by the Plaintiff and

the second Defendant, which were rejected, as hereinbefore stated, the Court discarded the whole of the oral testimony as most unsatisfactory and unworthy of any reliance being placed upon it. The judgment mainly proceeded upon the fact of the possession and enjoyment by the *Zemindar* of *Yettiapoqram* of the lands in question up to the attachment by Government, as established by the Plaintiff's exhibits, and upon the fact that, although there had been disputes about the lands between the *Zemindar* of *Ramnad* and the *Zemindar* of *Yettiapooram* in the year 1819 and subsequent years, the *Zemindar* of *Ramnad* had always shrunk from an investigation into the alleged title; and the Court stated as their opinion, that the second Defendant (the Appellant) had entirely failed to establish the fact of her having any legal title to the lands in question.

An appeal against this decree was made to the *Sudder Dewanny Adawlut* at *Madras*, and on the 15th of *July*, 1861, that Court, consisting of Messrs. *H. D. Phillips* and *H. Frere*, pronounced a decree affirming the decree of the Civil Court, and dismissing appeal with costs.

The present appeal was brought from this decree of affirmance.

Sir *Hugh Cairns*, Q.C., and Mr. *Pontifex*, appeared for the Appellant; and

The Attorney-General (Sir *R. Palmer*), and Mr. *W. H. Melvill*, for the Respondent.

For the Appellant it was contended, first, that his claim to the land was sufficiently established, and that the Respondent had not proved his title; secondly,

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that as evidence adduced by him had been improperly rejected by the Court below, the case ought to be sent back to *India* for further inquiry, as it would be a denial of justice to uphold the *Sudder* Court's decree in such circumstances.

On the part of the Respondent it was insisted, that the lands for many years prior to the attachment by Government had been in possession of the *Zemindar* of *Yettiapooram*, and that the case presented to the Court below was such as to afford a strong presumption of title in the Respondent, who was entitled to be reinstated in the possession of the lands, as the Appellant had utterly failed in making out any right or title of himself, or any preceding *Zemindar*, to the lands, and that all that he had done for years was simply to object to the Respondent's possession; and it was submitted that, even assuming that neither of the parties had shown a good title, yet that the Respondent, as being the occupier of the land at the time of the Government attachment, was to be presumed the owner, and entitled to possession.

The Right Hon. Lord KINGSDOWN.

This suit was instituted for the purpose of establishing the right of the Plaintiff to certain lands which he said belonged to his *Zemindary* of *Yettiapooram*. The result of it was, that neither the Plaintiff nor the Defendant could make out any clear title, and the Plaintiff was only able to establish that he had had possession of the property at the time of, and prior to, the attachment by the Government. Under these circumstances, the Civil Judge thought that the best course to be adopted was to restore possession of

the lands to those from whom it had originally been taken.

It was an uncultivated district, lying between the *Zemindaries* of *Yettiapooram* and *Ramnad;* and it would seem that in the year 1819, the *Ramnad Zemindar* complained that, although the land in question belonged to her village of *Paralachi*, it had been encroached upon by the *Ryots* of *Budalapuram*, a village belonging to *Yettiapooram*, to the extent of 550 *kurukhams*. An inquiry was ordered by the Collector of *Madura*, the result of which appears to have shown that the *Ryots* were only doing that which they had always been accustomed to do.

No further steps were taken, and the party complaining seems to have been satisfied that there was no sufficient case, and the lands in question continued to remain in the possession and enjoyment of the *Zemindar* of *Yettiapooram*. In the year 1825 another complaint was made to the Collector of *Madura*, by the *Zemindar* of *Ramnad*, of another encroachment upon land belonging to the village of *Paralachi*. An Officer was deputed to make inquiries. He proceeded to the village of *Budalapuram*, and commenced an investigation. Notice was given of the purpose for which he had arrived, but no one attended on behalf of the *Zemindary* of *Ramnad;* so that the Officer was obliged to go away without hearing anybody in support of the complaint.

There is no reason to doubt that at this period the lands were occupied by the *Zemindar* of *Yettiapooram*. In 1829, a complaint was again made by the *Zemindar* of *Ramnad* of encroachments on his territory, and again, although he received due notice, he neglected to proceed with his complaint. Then,

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in the year 1834, proceedings were had with reference to the eastern lands, and the *Zemindar* of *Ramnad* appears to have abandoned all claims to the northern lands. Mr. *Blackburne* then makes his award in favour of the *Zemindar* of *Ramnad*, and the *Zemindar* of *Ramnad* on this revives the dispute as to the northern land, and thereupon the lands were attached by the Government in 1836, and have since remained in their hands. These facts, in our opinion, go to show that in 1836, at the time when the lands were attached by the Government, and long prior thereto, the lands in dispute were in the possession of the *Zemindar* of *Yettiapooram*. We think that the title of the Respondent must be preferred, and their Lordships will, therefore, advise Her Majesty to dismiss this appeal with costs.

GOUR MONEE DEBIA - - - *Appellant.*

AND

KHAJÂH ABDOOL GUNNEE - - *Respondent.**

On appeal from the Sudder Dewanny Adawlut, at Calcutta.

4th June, 1864.

IN this case leave to appeal had been granted by the Judicial Committee in *December*, 1860, upon the terms of the Appellant giving security in the sum of £300, for the costs, in case the appeal should be dismissed. This sum was deposited with the Registrar of the Privy Council, and the transcript of the record transmitted from *India*. The Respondent lodged his printed case; but the Appellant, although served with peremptory notice to lodge his case, took no step to bring the appeal to a hearing.

In these circumstances,

Mr. *Cave*, for the Respondent,

Moved to dismiss the appeal, and for payment of

Upon special application, permission to appeal was granted in *December*, 1860, upon condition of the Appellant depositing with the Registrar of the Judicial Committee of the Privy Council the sum of £300, for costs. The record was transmitted from *India* and the Respondent brought in his printed case, but the Appellant, though served with a peremptory notice, did not lodge his case or take any other step in the matter. In such circumstances, on application by the Respondent, the appeal was dismissed, and the Respondent's costs directed to be paid out of the sum deposited in the Council office, the balance to be returned to the Appellant.

* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John T. Coleridge.

Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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the Respondent's costs out of the £300, deposited with the Registrar of the Privy Council; and

Their Lordships made an Order in those terms, directing the residue of the sum, after payment of the Respondent's costs, to be paid over to the Appellant.

The Respondent's costs were taxed, and the residue of the £300, paid to the Appellant's Solicitor.

PAKALA BALAKRISTNAMA PATRULU - *Appellant,*

AND

SREE NARAINA MARDARAZ DEVU - *Respondent;**

AND BETWEEN

PAKALA BALAKRISTNAMA PATRULU - *Appellant,*

AND

SREE NARAINA MARDARAZ DEVU - *Respondent.**

On appeal from the Sudder Dewanny Adawlut at Madras.

5th & 6th July, 1864.

THESE appeals were brought from two judgments of the *Sudder Dewanny* Court at *Madras*, which

In the district of *Ganjam*, situate in a remote part of the Presidency of *Madras*, the administration of justice is by the Act of the Legislative Council of India, No. XXIV. of 1839, vested in an Officer called "The Agent of the Governor of *Madras*," who exercises both judicial and revenue authority within the district. The Court

* Present:—Members of the *Judicial Committee*—The Right Hon. Lord Kingsdown, the Master of the Rolls (the Right Hon. Sir John Romilly), and the Right Hon. Sir Edward Ryan.

Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

confirmed two previous decrees made by the Agent of the Governor of *Madras* at *Ganjam* in the Presidency of *Madras*, in suits instituted before that Agent.

The first suit was brought by the Appellant against the Respondent and one *Sree Ramachandra Manasing Santa*, since deceased, in which he claimed under a Bond, one fourth part of the *Talook* of *Aragada*, belonging to the Respondent, with mesne profits. This suit was dismissed on the ground that the instrument under which the Appellant claimed was obtained by intimidation exercised by means of his official position, as chief manager of the Agent's Court at *Ganjam*, from the Respondent under pressure and without consideration; which decree was confirmed on appeal by the *Sudder* Court at *Madras*. The second suit, instituted by the Respondent against the Appellant, sought to set aside and cancel a *Razinamah*, or compromise of a suit between the Appellant and Respondent. By the decree of the Agent of the Governor at *Ganjam* the *Razinamah* was, in the circumstances, declared null and void, and such decree was upon appeal affirmed by the *Sudder* Court.

When the transactions in question arose, the relations of the parties stood thus:—The Appellant was

there established is not subject to the *Madras* Regulations applicable to the ordinary Tribunals. In these circumstances, it was held, that it was not to be expected that the proceedings before such a Court should be conducted with all the attention to technical rules observed in the regular Courts in *Madras*, and, therefore, that it was sufficient if the proceedings had been such, in point of form, as to enable each party fairly to bring forward and establish his case, and the decision of the Agent consistent with law and justice.

A *Razinamah* to compromise a suit, and a Bond arising out of the same transaction, recognizing a right in one-fourth of a *Talook*, declared null and void, as having been obtained by fraud and intimidation by the Manager of the Agent's Court at *Ganjam*, who used his official character, as a pressure upon a *Zemindar* in difficulties in that district, to effect from him the execution of such instruments.

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the chief manager of the Agent's Court at *Ganjam*. The Respondent was a person in high position, the *Zemindar* of the *Talook* of *Kallikota* and *Aragada*, residing within the jurisdiction of the Agent's Court.

The administration of justice in *Ganjam*, a District situate in a wild and remote part of the Presidency of *Madras*, is, under the Act of the Legislature of *India*, No. XXIV. of 1839, vested in an Officer called "The Agent of the Governor of *Madras*," before whom the suits out of which these appeals arose were brought.

The evidence with respect to the execution of the above-mentioned instruments, and the questions raised by the appeals, are sufficiently stated in their Lordships' judgment.

The Attorney-General (Sir *R. Palmer*), and Mr. *F. J. C. Millar*, appeared for the Appellant in both appeals; and

Sir *Hugh Cairns*, Q.C., and Mr. *A. S. Ayrton*, for the Respondent.

23rd July, 1864.

Their Lordships' judgment was pronounced by

The Right Hon. Lord KINGSDOWN.

These appeals arose out of certain transactions which have taken place between the Appellant and the Respondent, in the District of *Ganjam*, within the Presidency of *Madras*.

Ganjam is situate in a remote and wild part of that Province, and is governed by an Officer called the Agent of the Governor of *Madras*, who appears to exercise both judicial and revenue authority within the district.

The Courts of Justice there are not subject to the rules prescribed by the Government Regulations for the guidance of the Tribunals in more settled and civilized parts of the country; and, under such circumstances, it is not to be required or expected that the proceedings should be conducted with all the attention to technical rules which might be reasonably demanded from Courts differently constituted. It is sufficient if the proceedings have been such, in point of form, as to enable each party fairly to bring forward and establish his case, and if the decision appears to be consistent with law and justice.

In the year 1855, the Appellant was the chief manager of the Agent's Court at *Ganjam*. His brother held the office of *Moonshee* to one of the assistant Agents.

The Respondent is a *Zemindar* of wealth and considerable position within the District. He seems at this time to have been a very young man, and to have been acting in the management of his affairs under the advice of his uncle, *Sree Ramachunder Manasing*, who lived with him in his palace.

The questions in these two appeals are, whether certain instruments executed by the Respondent in favour of the Appellant were obtained from him fairly, or were the result of fraud and intimidation practised on him by the Appellant.

The facts appear to be these:—

In the year 1854, the Respondent purchased at a public auction the *Talook* of *Aragada*. The property was put up for sale by the Government in consequence of the failure of the former *Talookdar* to make payment of the revenue due from him.

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The purchase-money paid by the Respondent was Rs. 1,51,000.

In 1855, it was agreed between the Appellant and the Respondent that the Appellant should become the Manager of this *Talook* on behalf of the Respondent. The Appellant alleges, that the offer was made to him by the Respondent and that he accepted it, and gave up his situation under the Government in order to take this office, but that when in the year 1856, he came to take possession of it, the Respondent refused to appoint him; and for this breach of his agreement the Appellant demanded compensation.

The Respondent alleges, that the offer to become Manager of the *Talook* came from the Appellant, who represented that he was not willing to continue in the service of the Agent; that he, the Respondent, accepted the offer, but afterwards declined to employ the Appellant, upon two grounds: first, because he did not come to undertake the duties of his office until, in consequence of his delay, the Respondent had been obliged to engage another Manager; and, secondly, because he had discovered that the Appellant had given up his office under the Government, not for the purpose of entering upon the management of the *Talook*, but from apprehension that he would be turned out of his place under the Government for misconduct and corruption as soon as his principal, who had been for some time absent from his office, should return to it.

In order to recover damages from the Respondent for his alleged breach of contract, the Appellant instituted a suit against him in the Civil Court of

Ganjam, in the month of *August*, 1857, to which the Defendant put in a plea denying all claim on the part of the Appellant.

Nothing further appears to have been done in this suit, which in the present record is termed suit No. 29 of 1857.

In a few months afterwards, in *April*, 1858, the Appellant and his uncle were accused of having ill-used a native called *Madhava Dalai*, and on this charge they were both arrested and placed in custody.

On the 18th of *May*, 1858, while they were thus in custody, the Appellant executed two instruments, the validity of which is the subject of the present dispute.

The one related to the settlement of the suit, No. 29 of 1857, and professed to be a compromise of that suit. It is termed a *Razinamah*, and is in the form of a memorial presented to the Court in the suit by the Defendant, and assented to by the Plaintiff in these terms :—"The Defendant begs to represent that as the Plaintiff in this suit had entered into an amicable settlement, I agreed to pay him, in eight days from the date hereof, Rs. 5,441¾, made up of Rs. 3,790, the amount claimed; of Rs. 1,380, for nine months and six days from the date of the plaint, &c., the 13th *August*, 1857, to the present date, at Rs. 150 a month; and of Rs. 271¾, the value of the stamp for the plaint and other costs. Further, under the conditions entered into by me, to continue paying to the Plaintiff for his life, at Rs. 150 a month, in consequence of my having effected his removal from the office of Manager of the Agent's Court, I agree to pay to the Plaintiff for his life, on or before the 19th of every consecutive month, Rs. 150 a month, from the 19th instant, with-

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out regard to the service held by the Plaintiff or any business carried on by him. In the event of my not paying the same the Court is at liberty to collect the amount by enforcing this *Razinamah*, and pay it to the Plaintiff. Further, I have undertaken to pay my own costs. I, therefore, request the Court will be pleased to hold diary proceedings accepting this *Razinamah*, and directing the payment of Rs. 5,441¾, being the plaint amount and others aforementioned, and of Rs. 150 a-month, by me to the Plaintiff for his life. The Plaintiff begs to say that as I have agreed to the conditions above-mentioned, I request the Court will enforce the same.—18th of *May*, 1858."

The other instrument is called an "Instalment Bond," and is in these words:—"Instalment Bond executed by *Sri Sri Sri Narayana Mardaraz Devu*, *Zemindar* of the *Talooks* of *Kallikota* and *Aragada*, to *Pakala Balakrishna Patrulu*, on the 18th of *May*, 1858. Having sold to you for Rs. 42,000, one-fourth share of the *Talook* of *Aragada*, which I have purchased in auction, and received from you the sum of Rs. 23,125, out of the said purchase-money, both of us now enter into the following settlement, *i. e.* that the sale of the one-fourth share in question should be cancelled. That on this condition I should pay you Rs. 29,000, according to the instalments hereunder specified, and obtain receipts from you. And that in the event of my paying the money without failure of instalments, and taking receipts from you, neither you, nor your heirs, should ever and on any ground claim the portion of the *Talook* from me or my heirs. I shall, therefore, pay you the said amount accordingly and take back this document. If I fail to pay

the money according to the instalments, I shall receive from you the balance of the sale amount, get the subdivision of the *Talook* registered, and deliver it over to you with the past produce. Thus I have of my free will and consent executed this instalment Bond.

" Amount to be paid in eight days
from the date hereof is . . Rs. 18,000
Ditto to be paid in six months
from the date hereof is . . Rs. 11,000

Rs. 29,000."

A third instrument was executed, which was an acknowledgment by the Respondent of the terms contained in the papers already stated, and an engagement to abide by them on his part, and was as follows :—" *Nadava Sunnud* (Deed of acquittance) executed by *Pakala Balakrishna Patrulu* to *Sri Sri Sri Narayana Mardaraz Devu, Zemindar* of the *Talooks* of *Kallikota* and *Arugada*, on the 18th of *May*, 1858. As you have sold to me, for Rs. 42,000, one-fourth share of the *Talook* of *Aragada*, which you have purchased in auction, and received from me the sum of Rs. 23,125, out of the purchase-money, I have this day, as desired by you, become friend to you, and entered into the following settlement, *i. e.* that the sale of the one-fourth share in question should be cancelled. That you should pay me Rs. 29,000, according to the instalments hereunder specified. That on payment to me of the money according to the instalments, and obtaining receipts from me, I should forego my right to the said one-fourth share ; and that with respect to my allowance, provision having been made in the *Razinamah*, filed in suit, No. 29 of 1857,

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I should have no other claim against you. Having acceded to these conditions, I have executed this deed of acquittance. On payment of Rs. 29,000, according to the instalments fixed, I shall return to you the instalment Bond you have this day executed to me, and neither myself nor my heirs shall for ever, and on any ground, claim from you or your heirs for the said one-fourth share. Thus I have executed this deed of acquittance of my free will and consent.

"Amount to be paid in eight days from the date hereof is . . Rs. 18,000
Ditto to be paid in six months from the date hereof is . . Rs. 11,000

Rs. 29,000."

It will be seen that by the instalment Bond a sum of Rs. 18,000, was to be paid in eight days from the date thereof. This would be on the 26th of *May*. On that day the Appellant and his uncle were discharged out of custody on depositing Rs. 1,000, and entering into an engagement to appear in person to answer the charges against them when required by the Government. Fourteen days afterwards the Rs. 18,000, were paid by the Respondent to the Appellant. It is fit to observe that there is no direct evidence to connect the discharge of the prisoners with the execution of these instruments and the payment of this money, but the coincidence is certainly remarkable, and considering the situation which had been held by the Respondent and the situation which was still held by his brother, it is difficult to believe that the release of the prisoners was entirely unconnected with the transactions which had then taken place, or that the

Appellant had not something to do with their discharge. There seems to have been no reason why, if the accused parties were entitled to be discharged on their own recognizances on the 26th of *May*, they should not have been equally entitled to be released on bail when the charge was first made against them, instead of being exposed to the inconvenience, and, what they seem to have felt much more, the degradation and outrage on their personal dignity consequent upon their arrest and imprisonment.

These instruments were of a character in themselves to excite suspicion, particularly when executed by a person who at the time was under duress.

The suit, which was compromised by the *Razinamah*, had not been prosecuted. If the facts alleged by the Respondent were true, he had a complete answer to the demand. He had up to this time denied all liability to the Appellant, and yet by this document he submitted to all the demands of the Appellant in this suit, and engaged to make payments and incur obligations to the Appellant far beyond anything which any Court of Justice could have awarded to him if he had established all his allegations.

When this *Razinamah* was presented to Mr. *Thornhill*, the Principal Assistant Agent for registration, he seems to have been so much struck by its extreme improvidence that he ordered the head of the police in *Ganjam* to see the Appellant, and learn from him whether it really was his spontaneous act. This was on the 19th of *May*, and notwithstanding a certificate from the police officer that he had seen the Appellant, who acknowledged that he had acted from his own free will, Mr. *Thornhill* required the

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personal attendance of the Appellant. The Appellant accordingly, after some remonstrance, attended, and was examined, and after this the *Razinamah* was allowed to be filed, and the Rs. 5,441¾ mentioned in it were paid, but Mr. *Thornhill* seems still to have been far from satisfied, for the order for registration was in these terms:—"22nd *June*, 1858.—The *Zemindar* having personally appeared before me and assured me that he agrees to these terms, this *Razinamah* may be filed; but the settlement as to the filing of this *Razinamah* being very dubious, it cannot burden the estate with this allowance after the death of the *Zemindar*."

The effect of these acts of recognition we will consider when we have dealt with the case as to the instalment Bond.

With regard to the instalment Bond, it seems that the Respondent refused or neglected to pay the instalment of Rs. 11,000, which, by the conditions of that instrument, were due on the 18th of *November*, 1858. On the 13th of *January*, 1859, the Appellant filed a plaint, dated the 18th of *November*, 1858, against the Respondent, joining his uncle as a Defendant, on the ground that he was aiding and abetting the Respondent. The plaint stated the effect of the instalment Bond, and insisted that the Respondent had forfeited his right to repurchase the quarter share of the *Talook*, by reason of his neglect to pay the second instalment on the day, and he prayed to have a conveyance of the quarter share, together with mesne profits from the year 1855.

It is obvious that the Appellant's title to this relief depended entirely upon the truth of the facts which are recited in the Bond. If there had been such a

purchase of the quarter share as is therein stated, and such a payment as was therein alleged to have been made of part of the purchase-money, there was nothing unreasonable in the subsequent agreement. It amounted only to this, that the Appellant consented to give up his purchase on the condition of receiving a certain premium for doing so, with a right to retain his purchase if the conditions of the Bond were not performed.

His right, therefore, in this suit rested entirely on the first agreement, and not on the second. The instalment Bond was, in truth, according to the Respondent's construction, at an end. The Appellant insisted that, by the failure of the Respondent to perform its conditions, he, the Appellant, was remitted to his original rights. The matter for him to prove, therefore, was the first contract.

Now, the Respondent by his defences asserted, that the recital in the instalment Bond was a pure fiction, and that there had been no such sale by the Respondent, and no such payment by the Appellant, as were stated in the Bond, and he insisted that if there had been any such sale, a Bill of sale must have been executed on stamp paper, and that the Plaintiff should prove that a proper stamp had been purchased. Likewise, that if the Plaintiff had paid Rs.23,000, he would have obtained a receipt, and the receipt should be produced. He alleged, also, that both this instrument and the *Razinamah* had been obtained from him under circumstances of pressure and intimidation while he and his uncle were both in custody on a false charge; that such charge had been contrived and instigated by the Appellant in order to force the Respondent to comply with his unjust demands; that

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he had required the Respondent not only to pay him a large sum of money, but also to give him a share of the *Talook*; that he had threatened, with this view, to set up false charges against both the Respondent and his uncle, and that the Respondent was induced to execute these instruments by threats and promises of the Plaintiff, in the hope of relieving himself and his uncle from this persecution.

On the 29th of *June* the Judge of the Court gave out to the parties a statement of the points which each should endeavour to prove.

The Plaintiff was to prove the due execution of the alleged sale contract, and the payment by him of Rs. 23,000 on account of the purchase-money and the Bill of sale, and receipts were to be produced in Court.

The Defendant was to prove his statements regarding the threats and promises used by the Plaintiff in the interview during which the Bond was executed; secondly, to put in a concise statement of the grounds on which he believed the criminal charge against his uncle and that on which he was himself then under trial to have been the work of the Plaintiff; thirdly, to state briefly the nature of his connection with the Plaintiff, and the cause and date of the rupture between them.

As regards the Plaintiff, he failed to give any proof whatever of the execution of any sale contract or of the payment of any sum of money whatever on account of it, or to produce any document purporting to be such Bill of sale or receipt, or to show, as he had been challenged to do by the Defendant, that any stamp paper had been purchased on which the Bill of sale could have been written.

On the other hand, the Defendant proved by a return from the proper officer that no sale appeared to have been made at the Stamp Office for this district of a stamp applicable to this transaction between the months of *July* and *September*, 1855, the Bill of sale being alleged to have been made on the 28th of *September*, 1855.

The Plaintiff had alleged in his replication that the Bill of sale and other documents were in the possession of the Defendant, but he gave no evidence of this fact, nor did he either prove, or indeed allege, any circumstances which could reasonably account for such an unusual circumstance as the delivery to the vendor of the title-deed of the purchaser.

Destitute of all other proofs, the Plaintiff relied entirely on the evidence afforded by the recital in the Bond, and the circumstances under which it was executed and afterwards recognized. Now, with respect to the circumstances under which it was executed, it appears that on the 17th of *May*, the Defendant, being in custody on the charge already alluded to, signed a paper addressed to Mr. *Thornhill*, the principal Assistant Agent, in these words:—"I have to speak to *Pakala* (describing the Appellant) touching the matter of the suit No. 29 of 1857, on the file of the Agent, and, therefore, request you will be pleased to direct the *Circar Peons* watching at my gate not to prevent *Pakala* from coming in." It will be observed that this note makes no allusion to any dispute about the sale of any share of the *Talook*, but is confined to the suit of 1857. The Judge in the *Zillah* Court considers this application to have been a contrivance on the part of the Appellant to obtain access to the Respondent, and not the spontaneous

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act of the Respondent. But however this may be, it certainly does not indicate that at this time he was contemplating any arrangement with respect to the *Talook*, of which he had been for years, according to his representations to the Agent, resisting the attempts of the Appellant to obain a share.

Yet we find that, without any intermediate communication, this note having been sent on the 17th of *May*, an interview takes place on the 18th between the parties, and the result of that interview is, that the Respondent signs this Bond, by which he recognizes the right of the Appellant to one fourth part of the *Talook*, and agrees to pay Rs. 29,000, for its repurchase.

It seems very much as if these two papers must have been taken, ready prepared, by the Appellant to the Respondent, and no evidence is given to explain under what circumstances or with what assistance the Respondent consented to sign them. The only fact relied on by the Appellant is this—that more than once after the execution of the instruments, and after the Respondent had been discharged out of custody, he expressly recognized them, and paid a sum of Rs. 5,441¾ on account of the *Razinamah*, and Rs. 18,000, on account of the instalment Bond.

But if the account given by the Respondent be true of the influence under which he acted, that influence continued at the time when the recognition took place, and under such circumstances recognition goes for very little. His object was not merely to get out of custody, but to relieve himself from the persecution to which he and his uncle had, as he conceived, for two years been subjected by the Appellant in consequence of their refusal to comply with his demands.

With respect to the proof which the Respondent was called upon to give, he did not offer any evidence of the threats and promises alleged to have been used by the Plaintiff at the interview during which the Bond was executed, but he put in the statement required by the Judge, and also various documents in support of it.

The statement contained detailed particulars of the constant intrigues which he alleged to have been carried on against him and his uncle by the Plaintiff from the time of the rupture between them in 1856, and of the reasons by which he was led to believe that the charge by *Madhava Dalai* had been concocted at the Plaintiff's instance.

The documents which he put in to support this statement consisted of a great number of *Arzees*, or Memorials, presented by him to the Government during the year 1856, and subsequent years, and of other *Arzees* presented by his uncle on the same subject. The earliest of these papers seems to have been dated on the 25th of *July*, 1856, and the latest in 1858, and they contain statements of alleged acts of violence and threats by the Appellant against the Respondent and his uncle, of the arrest and conviction of the uncle on a false charge, which conviction was afterwards reversed by the Agent; this and other acts being attributed to the contrivance of the Appellant, and to the abuse by the Appellant's brother of his authority as *Moonshee* to one of the Assistant Agents. These *Arzees*, supposing them to be true, would abundantly support the charges brought forward in the pleadings and subsequent statements.

But it is urged, and with truth, that these *Arzees*

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are no proof of the facts alleged in them, and that there is no direct evidence that they were ever communicated to the Appellant. But for the purposes of this suit, the important question is, what was the impression on the Respondent's mind and under which he acted, rather than whether the impression itself was or not well founded; and we think that the *Arzees* contain sufficient evidence that at the time when the Respondent executed the instruments in dispute he was really under the influence of the feelings by which he alleges that he was induced to grant them, viz. that he believed that it was in the power of the Appellant, through his own influence and that of his brother with the Government authorities, to injure and to ruin him, and that for two years he had been suffering under such influence, and that the only way of relieving himself would be to comply with the exactions of the Appellant.

When regard is had to the nature of these instruments, and to the relative situation of the parties when they were executed, we think that more evidence would justly have been required to support them than was produced in this case by the Appellant, even if the transactions had taken place in Europe. But here they took place in a wild part of *India*, where exaggerated notions are entertained by the natives of the extent of power possessed over them by the Officers of the Government, and no great confidence seems to be felt in the honesty of the subordinate Officers, or the vigilance with which they are controlled by their superiors.

Now, upon these important points the Judge of the *Zillah* Court must be far more competent to form a

correct opinion than persons unacquainted with the district; and in his judgment in both the cases he expresses himself in the strongest terms upon the subject. In one of his judgments he uses these expressions: "It is clear from the public records that the *Zemindars* of *Ganjam* entertain the belief that the public servants possess the power of injuring or befriending them, and they have been in the habit of furnishing their local Agents with large sums to secure their goodwill. Hence the Defendant's plea that he feared the influence of a man like the Plaintiff, conversant with all the details of public business, and enjoying the confidence of the then authorities, is consistent with the ideas and practice of his class." He then remarks (a fact which must be within his own knowledge) that the Respondent first began to dispute the validity of these instruments about the time when the Appellant had fallen under the displeasure of the Agent on account of his intrigues in other *Zemindaries*, and when, therefore, the terror occasioned by his supposed influence with the Government authorities was removed, or at all events diminished, in the mind of the Respondent.

The Judges of the *Sudder* Court, who are gentlemen also well acquainted with the modes of thought and feeling amongst the natives of *India*, have unanimously concurred in the judgment appealed from, and on application for a review have persisted in their opinion.

It was said that in the *Razinamah* suit there was really no evidence. In strictness that seems to be so. But the suits were substantially suit and cross-suit, and the evidence in the one might very properly be looked at in the other. The effect of the decision in the

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Razinamah suit is only to remit the Appellant to the prosecution of his original claim, towards satisfaction of which, if he has any just demand, he seems already, under the *Razinamah*, to have received between Rs. 5,000 and Rs. 6,000.

Upon the whole, we must humbly advise Her Majesty to affirm both the decrees complained of, with costs.

RAJAH PERLADH SEIN - - - *Appellant,*

AND

BABOO BHOODOO SINGH - - - *Respondent.**

On appeal from the High Court of Judicature at Calcutta.

28th Nov. 1864.

By a decree of the *Sudder* Court at *Calcutta* a suit was remanded to the *Zillah* Court to be tried *de novo*. An appeal to *England* from this decree was refused, but upon special application was admitted by the Judicial Committee of the Privy Council; whereupon the Appellant applied to the High Court at *Calcutta* to stay proceedings pending the appeal to *England*, on the ground, that the decision of the appellate Court would govern the question at issue, which application that Court refused. The Appellant then presented a petition to Her Majesty in Council, and applied *ex parte* for the same relief, but the Judicial Committee, in the Respondent's absence, refused to make any order, though without prejudice to the Petitioner's further application when he had served the Respondent.

BY an Order in Council, dated the 27th of *July*, 1863, special leave was given to appeal from a decree of the High Court of Judicature at *Calcutta*, dated the 7th of *February*, 1863, refusing an appeal from a

* Present: Members of the *Judicial Committee*—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir Edward Ryan.

Assessor: The Right Hon. Sir Lawrence Peel.

decree of the late *Sudder* Court of the 27th of *September*, 1860. By this latter decree the Court remanded the suit to the *Zillah* Court to be tried *de novo*; the question at issue being the validity of a deed of sale and an account.

The Appellant, after the admission of the appeal in *England*, presented a petition to the High Court of Judicature at *Calcutta*, setting out the Order in Council allowing the appeal, and submitted that the decree of the 27th of *September*, 1860, having been appealed from, could not be carried out against the Order in Council of the 27th of *July*, 1863. This application came on for hearing before the High Court on the 16th of *September*, 1864, when the Respondent appeared and objected to the proceedings being stayed, and the Court was of opinion, that there were no sufficient grounds for staying the further execution of the decree of remittal.

The Appellant now presented a petition to Her Majesty in Council praying that the proceedings in *India* might be stayed, pending the appeal; and submitted, first, that the hearing of the suit in the *Zillah* Court, if proceeded with under the remand, would involve much litigation and expense, and might turn out wholly unnecessary, as the validity of the instrument of sale would in fact depend upon the decision come to upon the appeal; and secondly, that the proceedings by the High Court under the remand of the suit, as well as the refusal to stay proceedings and the execution of the decree, was a violation of the Order in Council granting him leave to appeal; and he prayed that the proceedings ordered to be taken before the *Zillah* Judge under the remand by the decree of the 27th of *September*, 1860, as well as

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execution thereof, might be stayed, pending the appeal, and until the same had been heard.

The Respondent, being in *India*, was not served with notice of the application, which was made *ex parte*.

Mr. *Leith*, for the Petitioner,

Urged the above grounds, and, by analogy, referred to the practice of the House of Lords, *Macqueen's* Prac., pp. 236-8, in staying execution of proceedings pending an appeal to that House.

The Lord Justice KNIGHT BRUCE:

Their Lordships feel great difficulty in making any Order upon this petition. It is an *ex parte* application, novel in its circumstances and nature. Upon the whole, they think the petition must be dismissed; but, if the Petitioner desires it, his petition may stand over, with a view to enable him to try to bring the Respondent here, by serving him in *India*. If the Petitioner desires it a fresh application can then be made.

Mr. *Leith* elected to adopt this course,

And by an Order in Council, it was ordered, that the petition be dismissed, without prejudice to any further application to their Lordships.

RAJAH LELANUND SINGH BAHADOOR - - - - - - } *Appellant.*

AND

MAHARAJAH MOHESHUR SINGH BAHADOOR, and by revivor, MAHARAJAH LUKHMISSUR SINGH, his son, MAHARAJAH RUHMUT ALI KHAN and others, and the Government - } *Respondents.**

On appeal from the Sudder Dewanny Adawlut of Bengal.

2nd, 3rd, 5th, 6th, 7th, 8th, 9th, & 10th Dec., 1864.

THE suit out of which this appeal arose was brought by the Appellant's father, *Rajah Bidianund Singh*, deceased, against the Respondent, *Maharajah Moheshur Singh Bahadoor*, and *Maharanee Wujhoonissa*, the Government, and the other Respondents, tenants

In a question of disputed boundaries the *onus probandi* lies upon the Plaintiff to prove by independent evidence his right to recover. But in the circumstances held, that the mere failure on the Plaintiff's part to support the burthen of proof cast upon him, as to part of the lands claimed, was not conclusive as it would be in ejectment, and the case remitted to *India* for further inquiries

Upon a reversal of the *Sudder* Court's decree, costs of the suit already paid by the Appellant ordered to be refunded, and the Court below directed to deal with those costs and all other costs, including those of the appeal, according to the result of the inquiry.

* Present: Members of the *Judicial Committee*—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Assessors:—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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of the lands in dispute, to recover possession of a large tract of hill and forest country, containing 175,000 *beegahs*, claimed by the Plaintiff as belonging to and forming part of his *Zemindary* of *Khurruckpoor*, generally known as the *Nizamut Mahals* of *Khurruckpoor*, in the district of *Monghy*, in the province of *Behar*. The Appellant's father and the Respondent, *Maharajah Moheshur Singh*, were proprietors of separate estates conterminous with an estate of the latter, called *Pergunnah Havelee Khurruckpoor*, which had been formerly a *Mehal* or portion of the *Zemindary* of *Khurruckpoor*, but separated from it by the Government resumption lands, and completely surrounded on all sides by the revenue-paying lands belonging to the Appellant. *Maharajah Moheshur Singh* claimed the tract of land in dispute as being included from ancient times within, and as belonging to *Pergunnah Havelee*, and of certain resumed lands taken out of the *Zemindary* of the Appellant.

The question raised by the suit and upon appeal was solely one of boundaries. The documentary and oral evidence was of a most voluminous character, consisting chiefly of village papers, maps, proceedings and records. The important portion of the evidence adduced on either side which bore upon or is material to the question at issue, and the arguments, are sufficiently referred to in their Lordships' judgment.

The appeal was argued by

The Attorney-General (Sir *R. Palmer*) and Mr. *Leith*, for the Appellant; and

Mr. *Forsyth*, Q.C., and Mr. *W. H. Melvill*, for *Maharajah Lukhmissur Singh Bahadoor*, the heir of the first Respondent.

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Mr. *Forsyth*, Q.C., also appeared for the Government.

The case after argument stood over for consideration. Their Lordships' judgment was pronounced by

The Right Hon. the Lord Justice TURNER.

6th May, 1865.

The outline of this case is as follows:—At the time of the perpetual Settlement, the large *Zemindary* known as the *Khurruckpoor Mehals* in *Zillah Bhagulpoor* was settled with *Maharajah Kadir Ali Khan*, who in or before the year 1790 was in possession of it. It consisted of twenty-six *Pergunnahs*, of which five were alleged to be and were then held as *Lakhiraj*. Of these alleged *Lakhiraj Pergunnahs* it is only necessary to specify *Pergunnah Khurruckpoor Havelee*, which has throughout the argument before us been conveniently called "*Havelee*." Of the *Malguzary*, or revenue-paying *Mehals*, it is sufficient to name *Pergunnahs Suhrooe*, *Sukrabadee*, and the most important of all, *Purbutparah*, which was subdivided into *Tuppahs*, *Lodhwah* and *Semroum*, *Daygee*, *Mullia*, and *Bhudra*.

The Settlement above mentioned was made, as in other cases, by *Pergunnahs*, without any survey or measurement of the lands comprised in them; and as this vast *Zemindary* included a great deal of wild, uncultivated mountainous and forest land, it may be supposed that, however well ascertained may have been the boundaries of the whole, those of its component parts, or *Pergunnahs*, *inter se*, were not very clearly defined. The effect of the Settlement was to fix permanently and for ever the revenue payable in respect of the *Malguzary*, or, as they are

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termed in these proceedings, "the *Nizamut Mehals*," and to leave the *Lakhiraj Mehals* free from the payment of revenue, but subject to the right reserved to the Government by *Ben.* Reg. XIX. of 1793, to resume and assess the lands, should the tenure, under which they were claimed to be held *Lakhiraj*, thereafter be found to be invalid. *Kadir Ali Khan* on his death was succeeded by his eldest son, *Ikbul Ali Khan*, who also died some time before the year 1836, and was succeeded by his brother *Ruhmut Ali Khan.*

In 1836, the Government impeached the *Lakhiraj* title of the *Zemindar*. *Pergunnah Havelee* was resumed and separately settled. The proceedings which resulted in the settlement of it will hereafter be fully considered. At present, it is sufficient to say that they began in the year 1836, and continued until the 9th of *April*, 1844, when a temporary settlement for twenty years was made with the *Maharanee Wujhoonissa*, to whom the interest of her husband, *Ruhmut Ali Khan*, had been transferred.

Pending the proceedings for the resumption and settlement of this *Pergunnah*, *Ruhmut Ali Khan* suffered the Government revenue on the *Nizamut Mehals* to fall into arrear, and these *Mehals* were accordingly sold by public auction for such arrears, and on the 11th of *August*, 1840, were purchased by the Appellant's father, *Rajah Bidianund Singh*, and another person, who afterwards transferred his share to *Rajah Bidianund Singh.* This sale, of course, put an end to the unity of ownership of the *Nizamut Mehals* and of *Havelee; Rajah Bidianund Singh* thenceforward being the *Zemindar* of the former, with all the rights possessed by the original *Zemindar* at the date of the perpetual Settlement; whilst the latter,

subject to the rights of Government in respect of the revenue to be assessed thereon, continued to belong to *Rulmet Ali Khan*, and after him to *Wujhoonissa*.

In 1845, *Wujhoonissa* having failed to pay the revenue assessed on *Havelee*, that estate was also sold for the arrears, and was purchased by *Maharajah Rooder Singh*, the grandfather of the present Respondent, *Lukhmissur Singh*, on the 5th of *November*, 1845.

The estates having thus become separate, boundary disputes took place between the owner of the *Nizamut Mehals*, or his tenants, on the one side, and the owner of *Havelee*, or her tenants, on the other. It may be necessary hereafter to refer more particularly to the proceedings to which these disputes gave rise. At present, it is sufficient to say that the controversy was continuing during the proceedings of the Government surveyors engaged in making a topographical survey of the *Zillah Bhagulpoor* in the years 1846 and 1847.

It appears to have been the duty or practice of the Officers employed in this survey, to lay down the boundaries of estates or other divisions of land, where there was any dispute concerning them, according to the evidence which they might find of the actual possession of the lands. In the present case they had to deal with a controversy touching the boundary line between *Havelee* and *Pergunnah Purbutparah*, and the other *Nizamut Mehals* contiguous to it. The owner of the latter, on the one hand, insisted that this had been conclusively determined at the time of the settlement of *Havelee* by a map prepared after actual survey and admeasurement by a Captain *Ellis*, under the instructions of the settlement officers. The

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owner of *Havelee*, on the other hand, disputed the accuracy of Captain *Ellis's* map, if it purported to be a map of the entire *Pergunnah Havelee*, and questioned the intention to include the whole of *Havelee* in that map. The Officers of the survey, relying for the most part on the evidence which they had, or thought they had, of actual possession, came to a conclusion adverse to the Appellant's ancestor, and prepared the map known in the proceedings as "Captain *Sherwill's* map," by which upwards of 175,000 *beegahs* of land in excess of that comprised in Captain *Ellis's* map was attributed to *Havelee*, and taken out of the *Nizamut Mehals*, as laid down in that map. The effect of these proceedings was to leave somewhat doubtful the question, whether this land was included, or intended to be included, in the settlement of 1844, or whether it was a *Towfeer* or surplus which the Government was still entitled to assess *de novo*.

Some further proceedings afterwards took place in the *Foujdary* Courts and elsewhere, touching the right to the possession of this land; but the effect of these proceedings was to remit the Appellant, or his father, *Rajah Bidianund Singh*, to a regular suit, in which alone the title could be litigated.

The suit out of which this appeal has arisen was accordingly instituted by the Appellant on the 5th of *June*, 1851. Its object is to recover as part of the *Nizamut Mehals* the 175,000 *beegahs* of land laid down by *Sherwill's* map as within *Havelee*, in excess of the land attributed to *Havelee* by *Ellis's* map; but the plaint divides this land in certain proportions between certain specified *Mouzahs*, the names of which occur in the lists of the villages, comprised in *Pergunnahs Purbutparah* and *Sukrabadee*, which

were prepared at the time of the perpetual Settlement, or shortly subsequent to it. The Defendants to the suit, the Respondents to this appeal, are the Government, *Maharajah Lukhmissur Singh*, and some of his tenants, and they insist that the 175,000 *beegahs* of land in question properly belong to *Havelee*.

The suit was heard first by the Principal *Sudder Ameen* of *Bhagulpore*, who by his decree, dated the 9th of *July*, 1855, dismissed the suit on the ground that the Plaintiff had failed to establish a title to recover the lands in question. This decision was based upon proceedings of the Government surveyors, and seems to imply that the land was *Towfeer*.

On appeal to the *Sudder Dewanny Adawlut*, that Court, by a majority of two Judges to one, confirmed the decision of the Principal *Sudder Ameen*, but did not adopt its grounds. The two Judges appear to have held that something in excess of the lands comprised in Captain *Ellis's* map was included in the *Havelee* settlement, that the extent of that excess was undetermined, and that it lay upon the Plaintiff to show what he was entitled to recover, which he had failed to do. The dissentient Judge, on the contrary, held that no part of the land in dispute was included in the settlement of *Havelee*; that, therefore, *ex necessitate*, the whole must be taken to form part of the contiguous *Nizamut Mehals*, and that the Plaintiff had established his title to recover it.

According to the view, therefore, both of the affirming Judges and of the dissentient Judge, the decision of this suit depended on the question whether the land claimed, or any, and if any, what defined part of

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it, was included in the *Havelee* settlement; and we think that this was a correct view of the case. It was incontestible that the land in question formed part of the *Zemindary* which by the perpetual Settlement was assured to *Kadir Ali Khan*; but that *Zemindary* consisted partly of the *Nizamut* or revenue-paying *Mehals*, in respect of which the revenue payable by the *Zemindar* was then finally settled, and partly of the *Mehals*, including *Havelee*, which were alleged to be *Lakhiraj*, and on which, therefore, no revenue was assessed. The land in dispute is so situated that it must necessarily belong either to *Havelee* or to the contiguous *Nizamut Mehals*; but the perpetual Settlement unfortunately omitted to define the boundary line between *Havelee* and these *Mehals*; had it done so the question in the cause could not have arisen, since, we need hardly say, no Court would disturb what had been fixed by the perpetual Settlement. The resumption of *Havelee* afforded a fresh occasion for the definition of these boundaries, even whilst both *Havelee* and the *Nizamut Mehals* belonged to the same owner; because Government, by virtue of the resumption, acquired the right of assessing revenue upon all that lay within the boundaries of *Havelee*, whilst it had no right to assess any fresh revenue upon a single *beegah* of land within the *Nizamut Mehals*. Subsequent events severed the ownership of *Havelee* from that of the *Nizamut Mehals*, and the question of boundary then arose in this suit, not as a question of revenue between the Government and a *Zemindar*, but as one of title to land between the *Zemindars* and proprietors of two contiguous and separate estates, the *Nizamut Mehals* and *Havelee*.

In dealing with this question it must, as we have

said, be assumed that so much of the land in dispute as was not included in *Havelee* belongs to the *Nizamut Mehals;* and in considering what was included in *Havelee* the Court below could only deal, as we upon this appeal must deal, with the *Havelee* settlement as it stands. For the purposes of this suit that settlement must be considered as valid and subsisting. If the boundaries of *Havelee* ascertained by it are at all capable of being corrected, they certainly cannot be corrected in a suit of this nature. All that we can determine in this suit is whether, according to the true construction and effect of the *Havelee* settlement taken as it stands, the whole, or what part of the lands in question, belongs to *Havelee,* or the whole, or what part of them, is included in the lands which were the subject of the perpetual Settlement.

In considering this question three views of this *Havelee* settlement present themselves for our consideration.

The first is that it included, and was intended to include, the whole of *Pergunnah Havelee,* and that all which it did include is within the limits of *Ellis's* map. The second is, that it included, and was intended to include, the whole of *Pergunnah Havelee,* but that some portion of what it did include lies beyond the limits of *Ellis's* map, and is to be found in the district of which the ownership is now in dispute. The third is, that it did not include the whole of *Pergunnah Havelee,* but that, either from accident or design, the large district in question, or some undefined portion of it, was omitted from the settlement, as well as from the map, and is now what in these proceedings is called a *Towfeer* or surplus.

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We proceed, therefore, to consider the intention, extent, and effect of the *Havelee* settlement proceedings with reference to these views.

The first of these proceedings is that of the 1st of *July*, 1836. By it Mr. *Travers*, the Deputy Collector of the *Zillah Monghyr*, on grounds which, for the purposes of this suit, must be deemed sufficient, decided against the claim of *Ruhmut Ali Khan* to hold *Havelee* and the other four *Pergunnahs* to which we have before referred *Lakhiraj*, and affirmed the right of Government to resume and assess them.

There was an appeal against this Order, pending which the Government, not being able to effect an arrangement with the *Zemindar* as to the intermediate collections of *Havelee*, assumed the management of it by a *Tehsildar* of their own appointment. The appeal was dismissed on the 30th of *November*, 1837, by a Special Commissioner acting under *Ben.* Reg. III. of 1828, and the title of Government to assess the whole of *Havelee* thus became complete.

It then became the duty of the Deputy Collector, or the Settlement Officer, under *Ben.* Reg. II. of 1819, sec. 21, cl. 4, "to ascertain the limits of the land" (*i.e.* of the whole of *Pergunnah Havelee*), and to fix the assessment; and various proceedings were had with this object. Most of these proceedings are found *in extenso* in the first volume of the printed record, and we must refer to the more important of them.

On the 9th of *April*, 1838, Mr. *Farquharson*, described as the Superintendent of the *Khas Mehals*, but acting as the Settlement Officer in the case, held a proceeding as to *Havelee*. After reciting that the *Surhudbundee* and *Rookbabundee* (the specifica-

tions of boundaries and area) were not with the record, it ordered *Ruhmut Ali Khan* to file a list of the villages of *Havelee*, and also of *Pergunnahs Suhrooe, Sukrabadee, Singhool*, and *Luckhunpore, Pergunnah Purbutparah* (these being doubtless assumed to be the contiguous *Nizamut Mehals*), accompanied by a *Surhudbundee* thereof. It also ordered the *Putwarrees* to file the *Surhudbundee* and *Rookbahundee* of their respective *Mouzahs*. The object obviously was to obtain a definition by metes and boundaries both of the whole *Pergunnah* and of its component villages.

In the proofs and documents filed by the Plaintiff we have the actual process issued in respect of *Rounuckabad*, a principal village of *Havelee*, under this order, and the return to it. The dates are the 17th of *April* and the 31st of *May*, 1838, and there is a proceeding in the office of *Khas Mehals* of the 14th of *April*, 1838, before Mr. *Farquharson*. It complains of the omission of a village named *Bheembandh*, though part of *Havelee*, and that two other villages have been returned as waste, though in fact they were inhabited. It directs the attachment of *Mouzah Bheembandh* as far as *Koh Marug*, *Tuppah Dighee*, and gives other directions that are not material to the present question. It orders notice to be sent to *Ruhmut Ali Khan* that no settlement will be concluded with him unless he file correct *Jummabundee* papers.

On the 11th of *November*, 1838, *Mootee Lall*, the *Tehsildar* appointed by Government, reported to Mr. *Farquharson* that two *Mouzahs* adjoining *Bheembandh*, one named *Goormah*, the other *Pakum*, were west of *Beembandh* in the hills, and asked for an inquiry concerning them.

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This led to Mr. *Farquharson's* proceeding of the 23rd of *January*, 1839. In that, after stating that it had come to his knowledge that two villages (there called *Tolahs*) are situate in *Bheembandh*, but had not been attached, he directs the issue of a *Purwannah* to *Mootee Lall*, ordering him to bring these *Tolahs* under collection, and to explain why they had not been resumed along with *Bheembandh*.

Then we have the report of *Mootee Lall*, the *Tehsildar* of *Khas Mehal*, in answer to this order; it is dated the 8th of *April*, 1839. It appears to be indorsed on the *Purwannah*, and reports that after the issue of it, Mr. *Farquharson* had arrived at *Khurruckpoor* and had given a verbal order to relinquish *Mouzah Kormaha* (which is obviously the same place as that previously called *Goormah*), and to have the survey of *Kita Bakum* (before called *Pakum*) made with *Bheembandh;* that afterwards a *Purwannah* of the 23rd of *March*, directing a separate survey of *Bakum*, had arrived, and that accordingly *Mouzah Kormaha* had been relinquished, and *Mouzah Bakum* would be surveyed. On this report Mr. *Farquharson* has indorsed "That this be put up with the record: *May* 16th, 1839."

Intermediately Mr. *Farquharson* seems to have taken the depositions of *Meer Dad Khan*, a former *Tehsildar* of *Havelee*, and of *Bhowanni Lall*, described as an inhabitant of *Havelee*, but *Peshkar* of *Pergunnah Purbutparah*. The former was taken on the 8th of *April*, 1839, the other was taken on the 15th of *March*, 1839. They may have conduced to Mr. *Farquharson's* determination to relinquish *Kormaha*.

In the evidence there are detailed measurements

of the lands of *Mouzahs Rouncekabad, Bheembandh,* and *Mudhobun*. The second alone is dated, and as the date is the 24th of *March*, 1839, it may be inferred that *Kita Bakum*, which by the report of the 8th of *April* is treated as about to be separately measured, was not included in this measurement.

On the 15th of *April*, 1839, *Ruhmut Ali Khan* who describes himself as *Malik* or *Zemindar* of the entire *Mehals* of *Khurruckpoor*, presented a petition, which, as we understand it, is confined to *Bakum* as a *Kita* or part of his *Nizamut Mouzah Bhorebhundaree*. He protests against its inclusion in *Havelee*. The petition seems to have been presented to Captain *Ellis*, then engaged in surveying *Havelee* and making his map. He on the 22nd of *April*, 1839, directed a copy to be sent to the Settlement officer (Mr. *Farquharson*), who on the 6th of *May*, 1839, directs the officer (*Ellis*) to be informed that the case is pending in that *Cutcherry*. The decision was adverse, for we have a further petition from *Ruhmut Ali Khan*, which (and as it seems wilfully) confounds *Bakum* with *Kormaha*, alleging that the former though relinquished had been separately surveyed by *Mootee Lall;* that the measurement papers of *Havelee* are being prepared and *Kita Bakum* inserted in the English map, and stating that he objects to take attested copies of the English map because *Kita Bakum* (a *Nizamut Mehal*) is inserted in it. The order indorsed on this petition is dated the 8th of *July*, 1839, and is, that it be rejected.

On the 14th of *September*, 1839, a summary settlement was concluded by Mr. *Farquharson* with *Ruhmut Ali Khan* for one year, *i. e.* from the 1st of

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May, 1839, to the 30th of April, 1840, and this by a subsequent order was confirmed and extended to *April*, 1841.

It was during the currency of this temporary settlement that the *Nizamut Mehals* were sold, and *Ruhmut Ali Khan's* interest became limited to the resumed *Mehals*.

It is also probable that during the same period Mr. *Beadon*, who had succeeded Mr. *Farquharson*, began the investigation which resulted in the proposal for a permanent Settlement, next to be considered, and that, in aid of that investigation, Captain *Ellis*, by his proceeding of the 30th of *June*, 1840, directed "the measurement papers of the *Mouzahs* of *Havelee*, filed by the *Ameens*, which had on comparison with the English measurement papers been found to correspond," to be forwarded to the Superintendent of *Khas Mehals*.

Mr. *Beadon's* final settlement proceeding is dated the 16th of *December*, 1841. It gives a summary of the former proceedings, and states that "whereas a perpetual Settlement of that *Mehal* (*Havelee*) was proper, and the *Mehal* having been surveyed by the Revenue Surveyor (who from the mention of his name in the next paragraph is clearly Captain *Ellis*), the measurement papers are forthcoming in the office. Hence, after inquiring into the *Jummabundee*, from the statements and papers of the cultivators and *Putwarrees*, a perpetual Settlement had been, conformably to Regulation VII. of 1822, concluded from the 1st of *May*, 1841."

The proceeding then details at great length the principles upon which this Settlement had been effected. It seems sufficient to state that Mr. *Beadon*

took the area as measured at 123,207 *beegahs* and a fraction. From this he deducted 60,433 *beegahs* and a fraction as absolutely jungle, waste, and unculturable, leaving a balance of 62,774 *beegahs* and a fraction. This again, when subdivided, was found to consist of 18,998 *beegahs* and a fraction of land actually cultivated, and producing, or capable of producing, rent; and of 43,775 *beegahs* and a fraction of land which, though not cultivated, he describes as "culturable." The annual revenue derivable from the cultivated land he estimated at S. Rs. 15,517, to which he added S. Rs. 738. 2, the amount of *Sayers* or miscellaneous revenue (a description of revenue which will require further consideration), making the total revenue S. Rs. 16,255. 6. The moiety of this, being, when converted from sicca Company's rupees, 8,666 and a fraction, he fixed as the revenue payable perpetually, abandoning all further claim to revenue from either the 43,775 *beegahs* of culturable, or the 60,433 *beegahs* of unculturable land.

It is to be observed that *Bakum* (spelt *Bakhum*) is included in the list of villages, its measured area being stated to be 129 *beegahs* 19 *biswas*. It follows, therefore, that whether the *Bakum* resumed by Mr. *Farquharson* be in *Ellis's* map or not (a question hereafter to be considered), its measured area is included in the 123,207 *beegahs*, the basis of the Settlement.

It is further to be observed that there is no trace of *Goormah* or *Kormaha* in this or the subsequent Settlement proceeding.

Again, it is to be observed that the total of the miscellaneous revenue, *Sayers*, or cesses, was taken by Mr. *Beadon* to be S. Rs. 738. 2., of which

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S. Rs. 576 consisted of rents payable by the lessees of the *Sayer Mehal*, according to the deposition of *Ameen Dad Khan*, taken on the 14th of *March*, 1841, and the rest consisted of the *Sayers* returned by the *Putwarrees* and *Ameens*. We may here observe, too, that in the S. Rs. 576 is included an item of S. Rs. 400 payable by *Rujjib Ali* as farmer of "*Ghauts Marug* and *Kurrailee*, &c.," touching which we have also his deposition, taken the 24th of *March*, and the *Ummulnameh* of 1248 (1841), a document which may be of some importance with reference to the present inquiry; for whilst it gives the names of various *Ghauts*, as proposed to be included in the lease to which it refers, it seems to indicate that the lease was to comprise not only such tolls as may be conceived to be leviable from persons passing the *Ghauts*, but *Bunkur*, which properly is a right of cutting wood, and *Phulkur*, a right of gathering fruit—rights indicative of a certain dominion over the soil in a given locality.

On the 16th of *September*, 1843, Mr. *Beadon's* proposal of a permanent Settlement on this basis was overruled by the Commissioner, who, on the 25th of the same month made over the estate to Mr. *Joachim Piron*, to be settled *de novo*.

Shortly before this, and on the 13th of *June*, 1843, the transfer of *Havelee* from *Ruhmut Ali Khan* to *Wujhoonissa* had taken place.

Mr. *Piron's* first step was to ask whether he was to make a new measurement. He was told to test the former measurement; to adopt it if he found it to be correct; to make a new one if he found it to be incorrect.

Mr. *Piron's* general report bears date the 20th of *June*, 1844; his settlement proceeding of the same

date: the *Doul* Settlement. The report states that he made a settlement for twenty years with *Wujhoonissa*, of which the other papers give the details and the principles. His report also states expressly that the measurement which he tested was that completed under Captain *Ellis*; that he found it correct in every instance; and that his only objection to the former survey regarded the classification of the various qualities of land and the rates assessed thereon.

The result of Mr. *Piron's* settlement was somewhat different from that of Mr. *Beadon*. But it is perfectly clear that both Officers dealt with the same measured area, viz. the 123,207 *beegahs* and a fraction defined by Captain *Ellis*. Mr. *Piron*, however, making a somewhat different classification of the lands, fixed the amount of revenue derivable therefrom by the proprietor of *Havelee* at S. Rs. 20,678. 3. 17½. In this he included the sum of S. Rs. 2,336. 8. 9¾ for *Sayers*, cesses or other miscellaneous revenue. Instead of leaving, as Mr. *Beadon* had done, free from any direct assessment of revenue 60,443 *beegahs* of unculturable + 43,775 *beegahs* of culturable land, making together 103,209 *beegahs* of land, he excludes from assessment only 4,447 old fallow land, + 35,051 rocks with jungle, + 42,586. 8. 4 of jungle, making a total of 82,084 *beegahs* and a fraction of land free from assessment.

The result of Mr. *Piron's* proceedings was a settlement with *Wujhoonissa* for twenty years at the moiety of the gross rental as estimated by him, which, when converted into the Company's rupees, amounted to C. Rs. 11,028. 12. 10.

The documents by which this arrangement was carried out with her, and her petition, *Kabooleat*,* and

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Mr. *Piron's* final order, all of the 9th of *April*, 1844, are all among the papers in the case. In the *Kabooleat* she describes herself as occupier of the entire *Pergunnah Havelee*, and says "123,186 *beegahs* and a fraction of land of the *Pergunnah* have been taken by me from you under temporary settlement at an absolute sum of C. Rs. 11,128. 12. 10, being a moiety of the *jumma*, including *Julkur*, *Bunkur*, *Phulkur*, &c."

We stop at this point in order to state the concluclusions at which we arrive from the proceedings and documents above referred to, in so far as they do not relate to the *Sayers* or cesses, or miscellaneous revenue —conclusions which in our judgment are no way affected by what has already appeared, or by what we shall presently state, as to these *Sayers* and cesses, or miscellaneous revenue. We are satisfied from these proceedings and documents that the settlement officers throughout intended to resume and settle and assess the revenues of the whole of *Pergunnah Havelee*, and that they throughout proceeded on the assumption of the correctness of the survey, measurements, and map made by or under the inspection of Captain *Ellis*. Looking to the great care and the minute attention which was given to the settlement of this *Pergunnah*, it cannot be supposed that any portion of it was designedly omitted from the settlement; and if any portion of it was omitted by accident, this is not a suit in which the accident can be set right. We think, therefore, that the third view of this settlement, to which we have above referred, may for the purposes of this suit be laid out for consideration, and that no part of the district in question can for any of those purposes be considered as *Towfeer*, or surplus. We are also

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satisfied from the evidence afforded by these proceedings that *Bakum* was included not only in the measured area of 123,186 *beegahs*, but also in *Ellis's* map. The objection expressed by *Ruhmut Ali Khan* in his rejected petition, to take attested copies of the map because it included, or was about to include, *Bakum*, is, we think, sufficient to prove this to have been the case.

Again, we are satisfied from these proceedings, and especially from the report of *Mootee Lall*, and Mr. *Farquharson's* mode of dealing with that report, and from the absence of all mention of *Goormah* or *Kormaha* in the subsequent settlement proceedings, that that village was advisedly relinquished by Mr. *Farquharson* as part of the *Nizamut Mehals*, and probably as part of *Mouzah Bhorebundharee* in *Pergunnah Purbutparah*.

It may be convenient also here to add, although it has no immediate reference to the foregoing proceedings, that from the proceedings by Mr. *Beadon*, officiating special of Deputy Collector of the 27th of *August*, 1841, the case of *Mouzah Ghorakhore* appears to have been solemnly decided in favour of the *Nizamut Mehals*, and that, in our opinion, the proceedings of the Officers of survey, of the 11th and 24th of *June*, 1848, are not entitled to weight as against that decision. We think, indeed, that the settlement of 1844 affords the only safe criterion for determining what belongs to *Havelee*, and what to the *Nizamut Mehals*.

It results from what we have already stated that, looking at this case without reference to the *Sayers*, cesses, or miscellaneous revenue, we should have come

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to the conclusion that *Havelee* as settled consisted only of the measured area of 123,186 *beegahs;* that this was all comprised within *Ellis's* map, and that the Appellant, by showing this, had at least shifted the burthen of proof, and established a good *primâ facie* title to recover the whole of the disputed territory; but it certainly cannot be denied that what appears upon the record before us as to these *Sayers*, or cesses, and this miscellaneous revenue, raises a very serious question whether some territory in excess of the measured area, and beyond the limits of *Ellis's* map, does not belong to *Havelee*, and was not included in the settlement of it. It is necessary, therefore, to see how the case stands as to these *Sayers*, or cesses, or miscellaneous revenue. By Mr. *Beadon's* settlement the revenue derived from these sources is stated to amount to S. Rs. 738. 2; and we have already shown how that sum was made up. By Mr. *Piron's* settlement the *Sayers* or cesses are stated as amounting to Rs. 2,336. 8 a. 9¾ p., made up partly of the sums returned by the *Putwarrees* and *Ameens* as the *Sayerat* of their respective villages, and partly of sums aggregating S. Rs. 1,116, which were not so returned; this last-mentioned item being thus entered in the settlement proceedings:—"*Bunkur* and *Boondee Mehal*, besides the *Putwarree's* paper, whatever came to light by the depositions of farmers and persons informed, and by the perusal of *Pottahs*, &c., S. Rs. 1,116." We have here, therefore, some, at least, of these *Sayers*, or cesses, described as *Bunkur* and *Boondee Mehals;* and other parts of this voluminous record contain the same or a similar description of them. We are of necessity, therefore, led to

inquire what these *Bunkur* and *Boondee Mehals* really were; and to some extent, at least, the evidence leaves no doubt upon this point.

Mr. *Piron* himself says that the S. Rs. 1,116 was made up of S. Rs. 785 inserted in the *Pottah* of *Peer Khan Soobahdar;* of S. Rs. 251 inserted in the deposition of *Rajee Singh*, son of *Durshun Singh;* and S. Rs. 80, inserted in the deposition and *Pottahs* of *Posun Pasee* and others.

Now, we have *Peer Khan Soobahdar's* examination, which seems to have been taken on the 20th of *January*, 1844. He is described as farmer of *Mehal Bunkur* and *Boondee Koh Marug*, and *Kurrailee*, &c., *Pergunnah Havelee.* He professes to hold, but in the name of his son, *Wahid Khan*, *Ghauts Marug*, *Kurrailee*, *Tabawee*, *Khuru Khataun*, *Hursa Poteeah*, *Burramupea*, *Shakole*, and several other hills and *Ghauts*, for the names of which he refers to the *Pottah*, at a rent of S. Rs. 785, and to pay the rent to *Ruhmut Ali Khan.*

Again, we have the examination of *Rajputee Singh*, the son of *Durshun Singh*, taken on the 30th of *January*, 1844, from which and the proceeding of Mr. *Piron* of the 26th of that month, we learn that *Durshun Singh* was farmer of *Mehal Bunkur Ghaut Koolurhea*, attached to *Mouzah Mudhoobun*, *Pergunnah Havelee;* that he, during the subsistence of his lease, paid a *jumma* of S. Rs. 251 to *Ruhmut Ali Khan*, who on the expiration of the lease in *April*, 1844, was about to bring that *Bunkur Mehal* under his personal collection.

The S. Rs. 80 "inserted in the depositions and *Pottahs* filed by *Posun Pasee* and others" we have been unable to trace in the record.

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Again, Mr. *Quintin*, who was the Superintendent of surveys of *Zillah Bhagulpore*, in his letter of the 19th of *October*, 1848, addressed to Mr. *G. F. Brown*, the Commissioner of Revenue for the division of *Bhagulpore*, refers to a variety of *Ghauts* as included in *Piron's* settlement; and so far as we can see they can have been so included only under the head of *Bunkur* and *Boondee Mehals*.

Again, it is clear upon the evidence that *Ghauts Marug* and *Kurrailee*, and possibly other *Ghauts* held by *Peer Khan Soobahdar* in the name of *Wahid Khan* at the date of Mr. *Piron's* settlement, were, at the date of Mr. *Beadon's* settlement, held by *Rujjib Ali*, and, indeed, that the whole of the property, whatever it was, the revenue of which Mr. *Beadon* estimated at S. Rs. 576, is included in the property of which the revenue was estimated by Mr. *Piron* at S. Rs. 1,116.

It is clear, therefore, that Mr. *Piron's* settlement did include under the head of *Bunkur* and *Boondee Mehals* the revenue coming from certain *Ghauts*, of which the most prominent are *Ghauts Marug* and *Kurrailee*; and that Mr. *Piron* was right in including rights in these *Ghauts* as part of the assets of *Havelee* is, we think, almost proved to demonstration by the village papers in the second and third volumes of the Appendix to which Mr. *Melvill* directed our attention.

Some of these are produced by the Appellant, others by the Respondent, and the two classes show, with a correspondence in minute details that proves their genuineness, that long before the resumption the proceeds of these *Ghauts* were uniformly treated by the owners of the whole *Zemindary* as part of the revenue

of the *Lakhiraj Mehal, Havelee.* Against this evidence it is vain to set the award of *Ruhmut Ali Khan* of the 13th of *April*, 1837, after the date of the resumption, or the *Kabooleats*, or the occasional entry in the village accounts of *Morkhut* as *Marug-khat.* They would at most support the theory that there may have been more than one *Ghaut* of the same name, or different rights resulting from the same *Ghaut;* the two former classes of evidence may, indeed, more plausibly be referred to the desire, after the resumption, to claim these *Ghauts* for the *Nizamut Mehals*, which, until the sale of those *Mehals*, it was *Ruhmut Ali Khan's* interest to do.

It must be taken, then, that Mr. *Piron* not only included, but properly included, the revenue arising from *Ghauts Marug, Kurrailee*, and other *Ghauts* in his settlement; but then the question is, What was this property, and does the ownership of it imply the ownership of any land in excess of the measured area, and beyond the confines of *Ellis's* map?

There is much evidence bearing more or less directly upon this point. There is the *Ummulnameh*, to which we have already referred, and there are the various suits and proceedings arising out of the long-continued litigation concerning these *Ghauts.*

The earliest of these proceedings which we find is under date the 12th of *March*, 1842. It was before the Magistrate in the Criminal Court under Act, No. IV. of 1840, and arose out of the alleged forcible dispossession of *Rujjib Ali*, the farmer under *Ameer Buksh*, of *Ghaut Bhoondee*, and *Koh Marug*, &c., by *Munniar Rae*, claiming the same subjects under a *Pottah* granted by *Ruhmut Ali Khan*, in his

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capacity of *Zemindar* of the *Nizamut Mehals*. *Rajah Bidianund Singh* intervened in the suit, objecting that it was brought in collusion with the former proprietor of the *Nizamut Mehals*, *Ruhmut Ali Khan*. This may have been the case, but the very objection shows that there was then a dispute whether the parcels in *Rujjib Ali's* farm, or some of them, belonged to *Havelee*, or to the *Nizamut Mehals*. The decision as to possession was in favour of *Rujjib Ali*.

The proceeding of the 24th of *March*, 1841, before Mr. *Beadon*, shows that during the investigation which led to his settlement there were disputes between the auction purchaser and the owner of *Havelee* touching certain stone quarries stated to be with the hill *Mar* and part of the *Boondee Mehal*. The report of *Ronshun Lall*, Record Keeper of the *Khass Mehal* department, of the 21st of *September*, 1841, was obviously made in answer to a reference made in some suit arising out of the same dispute touching these *Ghauts*, which we have been unable to trace. It shows that as early as the 21st of *September*, 1841, Mr. *Beadon* had included the *Ghauts* held by *Rujjib Ali* in the settlement of *Havelee*.

The question, whether these *Ghauts* belonged to *Havelee* or to the *Nizamut Mehals* continued to be litigated in one shape or another during the whole period which elapsed between the dates of the settlement by Mr. *Beadon* and that by Mr. *Piron*.

One instance is the suit of *Kishna Tewarry*, of which the final proceeding is that of the 12th of *June*, 1845, which gives the history of the whole litigation. It began with a summary suit brought before the

Collector by the *Naib* of the auction purchasers of the *Nizamut Mehals* (we presume in their name) against the Plaintiff for rent. The Collector has under the Regulations no jurisdiction to entertain such a suit unless the relation of landlord and tenant subsists between the parties. He, nevertheless, made a decree against *Kishna Tewarry* for the sum sued for. Thereupon *Kishna Tewarry*, alleging that he was not the tenant of the purchasers of the auction *Mehals*, but a sub-tenant of the owners of *Havelee*, brought his suit in the Civil Court (the *Moonsiff's*) against *Rajah Bidianund Singh* to quash the Collector's decree as made without jurisdiction. The *Moonsiff* decreed in his favour. There was an appeal to the Principal *Sudder Ameen*, who was against him. This was followed by a special appeal to the *Sudder Dewànny Adawlut*, which Court remitted the cause back to the Principal *Sudder Ameen*, with directions to try the proprietary right. This protracted and animated litigation, ostensibly for a sum of less than Rs. 7, was obviously made a mode of trying the question of title between *Rajah Bidianund Singh* as the purchaser of the *Nizamut Mehals*, and first *Ruhmut Ali Khan* and afterwards *Wujhoonissa* (each of whom intervened in the suit as an objecting party), as the owner of *Havelee*. The proceedings show that the real issue was, whether certain subjects, as to which all parties were agreed, including *Ghauts Marug* and *Kurrailee*, belonged to *Havelee* or to the *Nizamut Mehals*. The proceeding and report of the 9th December, 1843, are set fully forth in the evidence, showing that *Ghauts Marug*, *Kurrailee*, &c., were included in Mr. *Beadon's* settlement, were before the Court. The decision was, that

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the *Moonsiff's* decree should be upheld, and that it was impossible to determine the proprietary right except in a regular suit, in which the two claimants should be Plaintiff and Defendant. Not the least important part of this proceeding is that *Rajah Bidianund Singh*, in his answer in the suit, alleged that the *Ghauts* did not appertain to the rent-free *Pergunnah Havelee*, that the Revenue Surveyor had excepted them from the measurement. The objectors do not contest this last proposition, but insist that they are attached to *Havelee*, and do not belong to *Purbutparah*. Both sides, then, seem to admit that the subject of dispute was beyond the measured area and the confines of *Ellis's* map. There are similar decisions to the above in other suits specified and set forth in the Court below. The last is as late as the 15th of *July*, 1847.

Another instance of litigation involving the same issue is that in which *Syud Reaz Ali*, claiming as farmer of *Tuppah Lodwah*, was the suing party. By a proceeding of the 20th of *November*, 1843, the Collector of *Monghyr*, before whom this person had brought a summary suit to recover rent alleged to be due from one *Omachurn*, then an occupier of part of the *Boondee Mehal*; the Defendant having pleaded that the property in respect of which he was sued was part of *Havelee*, and had been settled with *Ruhmut Ali Khan*, called for the Settlement proceeding, and, in its absence, for a report from the Collector of *Bhagulpore* whether *Mehal Boondee* of *Ghauts Kurrailee* and *Komaruk* (obviously the same as *Koh Marug*) was comprised within the Settlement rights of *Ruhmut Ali Khan*, or was appended to any other *Mehal*.

There is a report of the Record keeper which purports to bear date the 13th of *November*, 1843, which was apparently made in answer to this requisition, though there is an inaccuracy in the printed date. It confirms the fact of the settlement as alleged by the Defendant. On this coming in, the suit was finally disposed of by Mr. *Vansittart*, the Collector, who dismissed the suit as one which he was incompetent to try, with liberty to the Plaintiff to sue in the Civil Court, if so advised. By this proceeding, it appears that *Wahid Khan*, the then farmer of *Ghauts Marug*, *Kurrailee*, &c., under *Havelee*, had intervened in the suit against his subtenant.

Again, the proceedings of the Collector of *Bhagulpore* of the 11th of *November*, 1843, those of the 9th of *December* in the same year, and the proceeding of the 19th of *March*, 1844, on the petition of *Syud Reaz Ali*, a farmer of *Tuppah Lohkwah*, all point to the conclusion that during the investigation which led to the settlement of Mr. *Piron*, *Meaz Reaz Ali*, claiming title under *Rajah Bidianund Singh*, if not *Rajah Bidianund Singh* himself, was unsuccessfully resisting the inclusion of the *Bunkur* of *Ghauts Marug*, *Kurrailee*, &c., in the settlement of *Havelee*. The proceeding of the same Collector of the 11th of *May*, 1844, is also some evidence of this.

It appears that *Peer Khan Soobahdar* delivered over possession of *Ghauts Marug*, *Kurrailee*, and the other *Ghauts* comprised in his farm, to the purchaser of *Havelee* at the sale for arrears of revenue in *November*, 1845, or attorned as tenant to him.

These contentious proceedings certainly afford a strong inference that *Ghauts Marug*, *Kurrailee*, and others, which were included in the settlement, were some-

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thing beyond the limits of the measured area and Captain *Ellis's* map. It is impossible to read them without believing that the parties knew well what they were disputing about, and that each was claiming the same things. It is not probable that these things were within the measured area. *Rajah Bidianund Singh* could hardly push his pretensions so far as to claim anything within that area. On the contrary, as we have seen in *Kishna Tewarry's* case, his contention was that the things claimed were beyond the measured area, and, therefore, belonged to him, and the opposite party seems to have admitted the fact and denied the consequence. Had one of the parties been claiming a *Ghaut* in one part of a mountain range, and the other insisting on his right to retain a *Ghaut* of the same name in another part of the range, it is inconceivable that there should be no trace of such a mistake in the pleadings of the parties, the reports of the Collectors, and the judgments of the Courts. In truth, the mention of the farm sometimes of *Rujjib Ali*, sometimes of *Wahid Khan*, in these proceedings, almost establishes the identity of the subject in dispute with the subject of the settlement.

The proceedings of the Officers employed in the topographical survey also bear upon this point.

Of the reports of *Talib Kurreem* and *Syud Hossein, Thachabust Ameens*, dated respectively the 28th of *February* and the 10th of *February*, 1847, both in answer to the petitions from *Rajah Bidianund Singh* and the orders thereon, it is sufficient to say that if they have no other value, they at least prove that when these persons passed from admitted portions of *Pergunnah Purbutparah* in the course of their survey into the disputed territory, they were met by

claims on the part of *Rooder Singh* and his tenants; and a *bonâ fide* contention whether the land on which they stood, which they went to survey, and as to the locality whereof there could be no mistake, belonged to the *Nizamut Mehals;* or, as appertaining to some of the *Ghauts* in question, was part of *Havelee.*

Then came the proceeding of Mr. *John Brown* on the 5th of *April,* 1847, in which both the parties were in presence. Mr. *Brown's* conclusion is no doubt against the view contended for by the Respondent, that the ownership of the revenue of these *Ghauts* imports the ownership of land in excess of the measured area, but his proceeding sufficiently shows that what the parties were claiming was in the disputed territory; one witness at least (*Lushkurree Lall*) connects the property claimed with the former holding of *Soobahdar Khan;* and though Mr. *John Brown,* in his eighth reason, suggests that the *Ghauts Marug* and *Kurrailee,* that were settled, are within the measured area, he does not point out where they are situated. Nor was there any suggestion on the part of the opposite party that *Rooder Singh* had shifted the locality of the property, so long in dispute between *Havelee* and the *Nizamut Mehals.* Mr. *Brown's* decision seems to have been overruled by Mr. *Quintin,* mainly on the ground that it proceeded on his construction of the settlement without regard to the evidence of possession.

Then followed the proceeding of the Deputy Collector, *Surfraez Ali,* of the 29th of *December,* 1847, in which there may be some false reasoning as to some of the points before him, but which clearly establishes that the *Ghauts* there claimed as comprised in the settlement of 1844, were the *Ghauts* of those names in the

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disputed territory, and were sworn to by *Soobahdar Khan*, who seems to have ceased to have any interest in the question, to be the *Ghauts* that were comprised in his lease. It seems very difficult to question the finding of this Officer making a local investigation, that the identity of the *Ghauts* claimed with those settled was made out.

Again, Captain *Sherwill*, the Revenue Surveyor, was a European officer of rank and of scientific reputation. He is at least entitled to credit for knowing his own business of topographer. He seems to have come by another road to the same conclusion as the *Ameens*, viz. that a large hilly district belonging to *Havelee*, and comprising these *Ghauts*, had been omitted from *Ellis's* map. He may be no authority touching questions of property, but he must at least be taken to have laid down accurately in his map the positions of the *Ghauts* known in the district as *Marug*, *Kurrailee*, and by other names, about which the parties were disputing before the *Ameen*. His personal examination of the district is recorded in Mr. *Quintin's* final proceeding of the 24th *June*, 1848, at p. 171. On the other hand it is to be observed that Captain *Ellis's* map does not profess to fix the sites of these *Ghauts*. Their existence within its boundaries is mere matter of speculation suggested by the ingenious and able argument of the Attorney-General, who did not attempt to point out precisely where they were situate.

This evidence, however, seems to us to point for the most part rather to what was claimed as belonging to *Havelee* than to the nature and character of the *Bunkur* and *Boundee Mehals* above mentioned, and of the revenue arising from the *Ghauts*, of which, in part at

least, they consisted; and certainly it does not satisfy us that *Havelee*, if entitled to any part, was entitled to the whole of the land in question in right of these *Bunkur* and *Boundee Mehals* and *Ghauts*. It is to be remembered that we have here to deal with a tract of land of enormous extent surrounded by *Havelee* and other *Pergunnahs*, and it is not easy to suppose that so large a tract of land should have escaped the attention of Captain *Ellis*, if the whole of it belonged to *Havelee* at the time of its being resumed; neither can we easily suppose that this large tract of land could have been intended to have been included in the *Havelee* settlement under the description of *Sayers* and cesses, when we find that other land of precisely the same quality and character was in that settlement described as land. We find, too, that the Officers of the survey have, as we have already pointed out, given to *Havelee* more than in our opinion belongs to it, and looking to the whole of the evidence in the case, we cannot see our way to conclude judicially that they have been right in giving to it the rest of the land in question.

We agree, indeed, with the majority of the *Sudder* Judges, that the Appellant has failed to prove that no part of the disputed territory was included in the Settlement, and that he has failed to prove by independent evidence his right to recover the *Mouzahs* specified in the plaint; but we cannot think that they were right in determining the case upon the mere failure on his part to support the burthen of proof cast upon him. Their judgment is not like one in ejectment under the old procedure; it is as final and conclusive between the parties as an adjudication on the merits would be. And its effect, as we have shown, is to

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give to *Havelee* some things which, on the evidence, we think belong to the *Nizamut Mehals.*

In these circumstances, the case, we think, is one which calls for further inquiry; but in saying this we by no means mean to intimate that the Appellant can be relieved from the burthen of proof. On the contrary, we think that there has been so much of possession on the part of *Havelee* that the burthen of proof must still rest upon the Appellant.

For the reasons which we have given, we think that this decree cannot be supported in its integrity, and the Order which we shall humbly recommend Her Majesty to make upon this appeal will be,—

To reverse the decree, but without prejudice to any question which may arise upon the inquiries to be made as after directed;

To declare the Appellant entitled to the *Mouzahs Goormah* and *Ghorakhore*, and the lands comprised therein and belonging thereto, and to all such other parts of any of the lands in question in the suit as are not included in the settlement of *Havelee;*

To declare that the settlement of *Havelee* comprises only the measured area of 123,207 *beegahs*, and so much of any of the land in dispute as upon the inquiries after directed may appear to belong or be properly attributable to the *Bunkur* and *Boondee Mehals* in the pleadings mentioned, or to the *Ghauts*, of which the same in part consist; and that the rights of *Havelee* in respect of *Bakum* do not extend beyond the 129 *beegahs* and 19 *biswas* mentioned in *Beadon's* settlement, and which are included in the 123,207 *beegahs;*

To inquire what is the nature and character of the *Bunkur Boondee Mehals*, and of the *Ghauts* com-

prised therein respectively which are included in *Piron's* settlement, and are therein estimated at S. Rs. 1,116; and whether the same, or any, and which of them, included any and what part of, or any and what right or interest in the land in question in this suit;

To declare that so much of the land in question in this suit as may upon such inquiry appear to be comprised in the said *Bunkur* and *Boondee Mehals* or *Ghauts* belongs to *Havelee,* and that the Appellant is entitled to recover the residue of the land in question, and to direct the Court to proceed in the suit as upon the result of such inquiry may appear to be just;

To direct any costs of the suit already paid to be refunded, and the Court to deal with such costs, and all other costs of the suit, including the costs of this appeal, as may seem just, having regard to the declarations aforesaid, and to the result of the said inquiry;

To declare that this Order is to be without prejudice to any proceedings which may hereafter be taken for the settlement of *Havelee.*

SALIGRAM and HURNARAYUN - - *Appellants,*

AND

MIRZA AZIM ALI BEG - - - *Respondent.**

On appeal from the Court of the Judicial Commissioner of the Province of Oude.

12th Dec. 1864.

THIS appeal was brought from a decision of the Judicial Commissioner for the Province of *Oude*, which affirmed a judgment of the Civil Judge of *Lucknow*, by which the suit of the Appellants brought to recover Rs. 10,000 and interest was dismissed, on the ground that it was barred by the rule of limita-

By sec. 9 of the Limitation Rules for the guidance of Civil Courts in *Oude*, as explained by the Circular Order of the Judicial Commissioner, No. 104 of 1860, the limitation of suits is fixed for three years in "suits for money lent for a fixed period, or for interest payable on a specified date, or dates, or for breach of contract, unless there is a written engagement or contract, and where Registry Offices existed at the time such engagement was registered, within six months of its date." That section held not to apply in the case of a Bond executed in 1855, before the annexation of *Oude*, when there was no Registry at the place it was made, and sued for in 1860, such transaction falling within section 14 of that Circular Order, where the period of limitation is, six years for "all suits on Bonds registered within six months of their date, or on Bonds formally attested when there was no means of registry, and all other suits for which no other limitation is expressly provided by these rules;" and a decree of the Judicial Commissioner of *Oude*, holding that a suit on the Bond was barred by the three years' limitation, provided by section 9 of the rules, reversed on appeal.

Quære, whether the rule of limitation as a bar to the suit, can be entertained without being pleaded.

* Present:—Members of the *Judicial Committee*—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Master of the Rolls (The Right Hon. Sir John Romilly).

Assessors:—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

tion applicable thereto. The question raised by the appeal turned solely on the point of limitation.

It appeared that on the 23rd of *November*, 1855, the Respondent being indebted to the Appellants, then carrying on business as Bankers at *Lucknow*, in the sum of Rs. 10,000, gave them a Bond for the repayment of that amount and interest, by monthly instalments of Rs. 1,000. This Bond was executed by the Respondent according to the native method which prevailed at that time between Bankers and their customers in *Lucknow*, but was not registered, there being no Registry Office or law or Regulation in force at that time by virtue of which it could have been registered.

In the beginning of the year 1856, the Kingdom of *Oude* was annexed to the Territories of the East India Company, and was thenceforward known as the non-Regulation Province of *Oude*, and on the 4th of *February* in that year, by a despatch of the Governor-General of *India*, the Courts of the Judicial Commissioner and Civil Judge were established for the administration of justice in that Province.

At the time of the annexation of *Oude* the Respondent had paid nothing on account of the Bond. After the annexation the Appellants continued to demand payment of their money, but the Respondent put them off on various pretexts. In the meantime the rebellion broke out, and the Appellants were obliged to leave *Lucknow*. On the restoration of the British authority, the Appellants again applied to the Respondent for payment, and were again met by various excuses; in consequence, the Appellants, on the 7th of *August*, 1860, filed a plaint in the Court of the Civil Judge at *Lucknow*, for recovery of the principal and

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interest due on the Bond, then amounting to Rs. 18,630.

The Respondent put in a plea, in which he alleged that the money for which the Bond was given had been borrowed by him as Agent for the ex-King of *Oude*, and that he had executed the Bond in his own name only in accordance with the then prevailing custom. He also objected that the date of the Bond had been altered, and denied that he ever had received the money.

The suit was heard, and on the 15th of *October*, 1860, Mr. *Fraser*, the Civil Judge, delivered his judgment, in which, after fully investigating the accounts between the parties and over-ruling the Respondent's objections, he dismissed the suit, on the ground that it had not been brought within three years from the date of the Bond. The Civil Judge in his judgment, after stating that the interval which had elapsed between the date of the Bond and the institution of the suit was four years, eight months, and fourteen days, proceeded as follows:—"Circular Order, No. 104 of 1860, supersedes the previous rules of limitation, and this suit was instituted after the promulgation of the new rules. These contain no prospective period of warning, so that I feel precluded from acting on the Officiating Judicial Commissioners' construction of Circular Order, No. 51 of 1859, which gave such Bonds as the present, the limitation of six years, as well attested Bonds, for when that Circular was cancelled, the Order, which is merely a construction of its provisions, was in effect cancelled too. But there remains a point which I suppose must have been fully considered, though it stands unexplained. Circular

Order 104 introduces Act, No. XIV. of 1859, as of immediate effect, while the last section of that Act prohibits its taking effect in any non-Regulation Province until two years after notice."

The Appellants being dissatisfied with this judgment, proceeding, as they contended, upon an erroneous view of the law of limitation applicable to their case, appealed to the Court of the Judicial Commissioner.

The Judicial Commissioner (Mr. *G. Campbell*) by his judgment, pronounced on the 14th of *December*, 1860, after observing that he had laid down his interpretation of the law of limitation as affecting such cases in Circular, No. 181, dated the 11th of *December*, 1860, proceeded as follows:—"It is quite clear to me that the Bond in this case is not one formally attested after the native method, and which should rank with registered Bonds. On the contrary, it is a mere unattested note of hand, and I think that not only the law, but equity, would give a short limitation in such cases under circumstances such as this. The defence is, that the money was drawn for matters connected with the Defendant's position as an Official of the late Government, and the informal character of the document favours the idea of its being an affair for prompt settlement. I think, therefore, that the three-year limit applies." After remarking that the case seemed a somewhat hard one, and that he should have been glad if a compromise could have been effected, the Judicial Commissioner confirmed the decision and dismissed the appeal, directing each party to pay their own costs in both Courts.

There being no provision by Statute or Charter for

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appeals from the decision of the Judicial Commissioner of the Province of *Oude*, in order to prevent the denial of justice leave to appeal was, upon special petition, allowed by the Judicial Committee under the Statute, 3rd & 4th *Will.* IV. c. 41 (*a*).

As the Respondent did not appear, the appeal was heard *ex parte*.

Mr. *Hobhouse*, Q.C., and Mr. *Cave*, for the Appellants.

At the date of the contract, which was prior to the annexation of *Oude* by the Government, the Mahomedan law was in force in *Oude*, and by that law there was no rule of limitation to bar the Plaintiff's suit. *Macnaghten's* "Princ. of Moohummadan Law," ch. XII., sec. 1, p. 76. Since the annexation various rules of limitation have at different times been regarded as in force in *Oude*, some of which were promulgated by Circular Orders of the Judicial Commissioner, without, as we submit, any authority for that purpose. At first the general twelve years rule, established by *Ben.* Reg. III. of 1793, sec. 14, appears to have been considered in force in *Oude*, although *Oude* being a non-Regulation Province, the Regulations were not applicable thereto. In *December*, 1856, the *Punjab* Amendment of that rule by which the limitation of actions of debt or contract, excepting partnership accounts, was reduced from twelve to six years, appears to have been applied to the Province of *Oude*, and was considered to have come into operation on the 1st of *June*, 1857, in accordance with notice to that effect; and again, the Circular

(*a*) See case reported on this point, *nom.* Salik Ram *v.* Azim Ali Beg, 8 Moore's Ind. App. Cases, 270.

Order of the 26th of *March*, 1859, No. 51, introduced further alterations in the rule of limitation after six months from the promulgation of that Circular; but the only legislative enactment imposing limitations of that kind is the Act, No. XIV. of 1859. That Act, however, does not bar the Appellants' rights, for two reasons; first, it is framed so as not to affect suits instituted, as this case is, in a non-Regulation Province within the period of two years from the date of the extension of the Act to that Province; secondly, if it affected this suit, it would allow the period of limitation to be six years, being founded on a written contract, which at the time and place of its execution could not be registered. Assuming the Circular Orders to have the force of law in *Oude*, the rules in force when the suit was instituted was No. 104 of 1860, which superseded Circular Order No. 51 of 1859; and the limitation for such a suit as the present is, by Circular Order, No. 104 of 1860, six years, as the suit, being founded on a written contract incapable of registry, falls within the exception of Rule 9, and is, therefore, provided for by Rule 14 of that Order. Section 10 certainly does not apply, as it refers to money lent for no definite period. Even if it could be held that the law in force when the suit was commenced was the Circular Order, No. 51 of 1859, the suit would fall within the six-year rather than the three-year limit, being founded on a Bond formally attested and duly executed.

Although the Respondent in his pleadings has admitted his execution of the Bond, yet he has not raised the defence of limitation at all. All he pleads is an unfounded hypothesis that the date was fraudulently altered by the Appellants.

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The Right Hon. the LORD JUSTICE TURNER:

There are some points in this case upon which their Lordships do not think it necessary to give any opinion.

They give no opinion upon the question whether the Regulation of limitations could or could not be made available without being pleaded; or upon the question whether this Bond ought to be considered as a Bond "formally attested" within the meaning of the Circular Order, No. 51 of 1859, or upon the question whether there is or is not in force, in the Province of *Oude*, any period of limitation.

These points may, as their Lordships think, be laid out of the case; and as to the Circular Order No. 51, they are of opinion, that it cannot be resorted to or applied in the present case, because there was a proclamation on the 31st of *July*, 1860, before this action was brought, by which that Circular Order was expressly repealed.

The Circular Order, No. 51, being then out of the case, the question to be decided must depend upon the Act of the 4th of *May*, 1859 (No. XIV. of 1859), or upon the Circular Order, No. 104 of 1860.

As to the Act of the 4th of *May*, 1859, it is clear, in their Lordships' judgment, that it cannot affect the question, because it was not to come into force in any non-Regulation Province until two years after a period to be fixed by proclamation, and those two years had not elapsed when the plaint was filed.

The case, therefore, is reduced to the single point, what is the effect of the Circular Order, No. 104?

Now assuming, as their Lordships do (that being the view most favourable to the Respondent), that this Order was in force (and their Lordships observe

that it was upon this Order the case appears to have been considered in the Court below to depend), its effect must, in their Lordships' judgment, rest entirely on the 9th and 14th sections of the Order; the 10th section, which was referred to in the argument, relating exclusively to "suits for money lent for no definite period," and it being clear that this suit was for money lent for a definite period. Let us consider, then, first, the effect of the 9th section, which has reference to suits in which the period of limitation is to be three years. It is in these terms: "Suits for money lent for a fixed period, or for interest payable on a specified date or dates, or for breach of contract, unless there is a written engagement or contract, and where registry offices existed at the time such engagement was registered within six months of its date, and signed by the party to be bound thereby, or his duly authorized agent."

Their Lordships understand this section, especially when contrasted with the 10th section, to mean that the rule referred to in it, is not to apply where there is a written engagement, and where, there being a written engagement, it is registered within six months of its date in cases in which a Registry Office existed at the date of the engagement; and there being, in this case, a written engagement and no Registry Office at the date of the engagement, they think that the section does not affect the case.

Then section 14, which has reference to suits in which the period of limitation is to be six years, is in these terms: "All suits on Bonds registered within six months of their date, or on Bonds formally attested when there were no means of registering, and

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all other suits for which no other limitation is expressly provided by these rules."

Now, as their Lordships have said, they give no opinion upon the question whether this is to be considered as a Bond "formally attested when there were no means of registering." If, on the one hand, it be so considered, the case clearly falls within the first branch of the section; but if, on the other hand, it be not so considered, the case as clearly falls within the other words of the section, "all other suits for which no other limitation is expressly provided by these rules."

Upon this ground, therefore, their Lordships are of opinion, that the judgment appealed from ought to be reversed, and that judgment should be entered for the Plaintiffs in the action. It may be right to add, that the Circular Order, No. 181, has not been overlooked, but that their Lordships do not consider it effectual to alter the view which they have taken of the case. The Plaintiffs are, in their Lordships' opinion, entitled to judgment for the debt and costs, and they must have the costs of the appeal. Their Lordships will humbly recommend Her Majesty so to order accordingly.

RANEE SURNOMOYEE - - - *Appellant,*

AND

MAHARAJAH SUTTEESCHUNDER ROY, BAHADOOR - - - - } *Respondent.**

On appeal from the Sudder Dewanny Adawlut at Calcutta.

17th & 18th June, 1864.

Suit by a *Zemindar* against a mesne tenant of his *Zemindary*, holding by hereditary tenure, in the nature of a *Mouroosee Istemraree*, to enhance the rent of the lands which had been held by the tenant and his predecessors anterior to the Decennial Settlement at an invariable fixed rent, dismissed.

By section 5 of *Ben.* Reg. XLIV. of 1793, it is provided, that when a *Zemindary* is sold by public sale for discharge of arrears due from the *Zemindar*, or others, to Government, "all engagements which such proprietor shall have contracted with dependent *Talookdars*, whose *Talooks* may be situated in the lands sold, as also all the leases to under farmers and *Pottahs* to *Ryots* for the cultivation of the whole or any part of such lands (with the exception of the engagements, *Pottahs* and leases, specified in secs. 7 and 8), shall stand cancelled from the day of sale, and the purchaser, or purchasers, of the lands shall be at liberty to collect from such dependent *Talookdar*, and from the *Ryots* or cultivators of the lands let in farm, and the lands not farmed, whatever the former proprietor would have been entitled to demand according to the established usages and rates of the *Perguunah*, or District, in which such lands may be situated, had the engagements so cancelled never existed." And the 7th section provides, that section 5 is not to authorize the assessment of any increase upon the lands of such dependent *Talookdars*

THE Appellant, a *Talookdar*, holding under the Respondent as *Zemindar*, was in possession of lands, on which certain buildings were erected, situate in

* Present: Members of the *Judicial Committee*—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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Dehee Shurruck Gobindnuggur, in *Pergunnah Ookhra*, under a *Mouroosee Istemraree*, an ancient tenure, which had been held at a perpetual fixed rent for sixty years previous to the Decennial Settlement.

The Respondent, who was a purchaser under mesne assignment from, and deriving title through, a previous purchaser of the *Zemindary* in the year 1823, at a public sale for arrears of Government revenue, under *Ben.* Reg. XI. of 1822, claimed the right to enhance or raise the rent hitherto paid by the Appellant, and those under whom she derived title. The suit was brought by the Respondent's father for that object.

The facts of the case were these:—

as were exempted from increase by sec. 41 of Reg. VIII. of 1793 at the Decennial Settlement of 1793.

In 1823, a *Zemindar* fell into arrears of revenue, and Government sold the *Zemindary* at public sale for discharge of the arrears due, whereby the auction purchaser acquired such rights to cancel leases, &c. as then existed; but he took no steps under *Ben.* Reg. XI. of 1822, secs. 30, 32, 33, which gave power to a purchaser to cancel the leases, or to enhance the rent, nor was any claim in that respect made by subsequent purchasers from him, until the year 1856, when the *Zemindar* then in possession brought a suit to enhance the rent. Held, reversing the *Sudder* and *Zillah* Courts' decree:

First, that the tenure, a *Mouroosee Istemraree*, under which the Defendant held was hereditary, and as it had been uninterruptedly held anterior to the Decennial Settlement at a fixed rent, the *Zemindar* had no power to enhance the rent.

Secondly, that such a tenure was not cancelled, *ipso facto*, by the sale in 1823, as the language in sec. 7 of *Ben.* Reg. XLIV. of 1793 showed that what was intended by sec. 5 of that Regulation was not the destruction of the tenure, but the enhancement of rent, under certain specified and equitable limitations.

Whether such power is not confined to the auction purchaser himself, and not to those claiming under him. *Quære.*

When false witnesses or forged documents are produced to support a case, such fact naturally creates suspicion; but if the appellate Court has to deal with a just case, though foolishly and wickedly attempted to be supported by false evidence, such circumstance will not prejudice the judgment on the merits, when the case is supported by independent evidence.

So ruled, when their Lordships were satisfied from the evidence that an ancient tenure existed, which was endeavoured to be supported by a forged document and evidence.

Such document being impeached, as being forged on the face of it, the case was directed to stand over for the original document to be transmitted from *India* for inspection at the hearing of the appeal.

Alexander Seaton, a former Collector of the *Zillah* of *Nuddea*, obtained previous to the Decennial Settlement from the then *Zemindar*, *Maharajah Kisto Chunder Bahadoor*, a *Mouroosee Istemraree Pottah*, creating an hereditary tenure in respect of 128 *beegahs* and 4 *cottahs* of land situate within his *Zemindary*, called *Pergunnah Ookhra*, at a perpetual fixed rent of Rs. 64. 1p. 12a. *Seaton* sold the land and factories erected thereon to *Rajah Lokenauth Roy, Bahadoor* (the grandfather of *Rajah Kristonauth Roy*, the husband of the Appellant), who paid to the *Zemindar* for the time being the same fixed rent. On *Rajah Lokenauth's* death, his son, the late *Rajah Hurrenauth Roy, Bahadoor*, succeeded, as his heir-at-law, to the land, also paying the same fixed rent.

About this time the *Zemindar* in possession allowed the Government revenue payable by him in respect of the *Zemindary* to fall into arrear; and, in consequence, in the year 1823, the Government Collector, under *Ben.* Reg. XI. of 1822, sold the *Zemindary* by public auction to one *Moodoo Soodun Sandial*.

After the sale, *Rajah Hurrenauth Roy* attorned to *Moodoo Soodun Sandial*, as such purchaser, and the latter received payment of the same fixed rent from the *Rajah* during the time that he remained the proprietor of the *Zemindary*. The purchaser did not take any proceedings under *Ben.* Reg. XI. of 1822, secs. 30, 32, and 33, with the view of avoiding or annulling the tenure on which the land was held, or to enhance the rent payable in respect thereof; nor did he in any manner question the title of the *Rajah*, or the validity of the tenure; but received the same rent. Subsequently, a Mr. *Harris*

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purchased the *Zemindary* from *Moodoo Soodun Sandial*, and he also received from *Rajah Hurrenauth Roy* the same fixed rent.

On *Harris's* death, his widow became the proprietor of the *Zemindary*, and received the same fixed rent from the *Rajah*. On the *Rajah's* death, his son, *Rajah Kristonauth Roy* succeeded as heir to the land. In the year 1845, *Maharajah Sreesh Chunder, Bahadoor*, became the purchaser by private sale of the *Zemindary*, from Mrs. *Harris*. Some time in the year 1846, *Rajah Kristonauth Roy* died, leaving the Appellant his widow and heiress-at-law.

It appeared that by an *Ijárá* (lease), dated the 15th *Cheyt*, 1256 (1849), *Sreesh Chunder Roy* leased the *Dehee Shurrack Gobindnuggur* for six years to one *Sreenath Roy* (who was originally made a Defendant, but who was no party to the appeal), upon the terms that a measurement should be made at the joint expense of the lessor and the *Ijaradar*; and that afterwards, in the year 1855, the *Ijaradar* not being able to concur in making the measurement, a measurement was made by the *Zemindar*, and in such measurement it was found that the Appellant was in occupation of the land in question, and was paying an inadequate rent according to the current *Pergunnah* rates. Accordingly, on the 25th *Jeyt*, 1263 (1856), a notice of an intended enhanced rent under sec. 9, *Ben.* Reg. V. of 1812, was issued with the *jumma wassil* papers.

On the 15th of *August*, 1856, a suit was instituted in the Civil Court of *Zillah Nuddea* by the Respondent's father, *Maharajah Sreesh Chunder Roy, Bahadoor*, against the Appellant, and *Sreenath Roy*,

to recover from her an enhanced rent, estimated at Rs. 1,470, according to the rates current in the village, of the houses and lands in her occupation.

The Appellant, by her answer, among other things, stated that more than sixty years before the year 1856, and previous to the Decennial Settlement, *Seaton* took of the then *Zemindar* a *Mouroosee Istemraree Pottah* on an annual rent of Rs. 64. 1a. 12p., and having erected some factories and buildings, sold his interest to *Lokenauth Roy, Bahadoor*, the Appellant's husband's grandfather; that on his death it passed to his son, *Hurrenauth Roy*, and from him to his grandson, *Kristonauth Roy*, the Appellant's husband, and from him to her; that on the 23rd *Bysack*, 1230 (1823), during *Hurrenauth Roy's* lifetime, he, not being able to lay his hands on the *Mouroosee Pottah* granted to *Seaton*, in consequence of confusion in his office during his minority, obtained from *Muddoo Sooden Sandial*, who had purchased the *Zemindary* at auction sale for arrears of Government revenue, a *Mouroosee Pottah* at the same rent, with a condition that the rent should "never undergo any increase or diminution;" and the Appellant further alleged, that the rent having been paid, it was not competent to the *Zemindar*, who claimed as a private purchaser under *Muddoo Sooden Sandial*, the auction purchaser and grantor of the *Pottah*, to enhance the rent. She further objected that *Seaton's Pottah* being for the erection of a factory, the case fell within the fourth exception out of the 26th sect. of Act, No. I. of 1845, and was, therefore, exempted from enhancement of rent within the meaning of that section. The Appellant filed with her

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answer the alleged *Pottah* of the 23rd *Bysack*, 1230, from *Muddoo Sooden Sandial.*

The Respondent in his replication (his father *Shreesh Chunder Roy* having died in the meantime) denied all the allegations in the answer in reference to the creation of any lease at a fixed and permanent rent; and, with regard to Mr. *Seaton*, he observed that, before the Decennial Settlement, to which period it was necessary to carry the creation of the tenure back to make it binding on an auction purchaser, there was a prohibition against the grant of perpetual leases to Europeans holding office in the *Mofussil;* and, in reference to the *Pottah* by *Muddoo Soodun Sandial*, he alleged that in several proceedings since the alleged execution of it, no mention of it whatever was made, when, if it existed in fact, it would have been mentioned.

The material issue was, whether the possession of the Appellant of the land, which was sued for, was held under a *Mouroosee* title, with a *Mocurrery Istemraree jumma.*

No evidence was offered by the Respondent in proof of the statements made by him in his pleadings, or to disprove any of the Appellant's statements or the facts which were proved by her witnesses.

The Appellant put in evidence the alleged confirmatory *Pottah;* the *dakhilas*, or receipts for rent, a *Mooktearnamah* signed and recorded by the late *Maharajah Sreesh Chunder, Bahadoor*, as well as a petition and report signed in the name of the late *Maharajah*, which acknowledged the title of the Appellant's husband and herself to the land in question. No document was put in evidence anterior to

the alleged confirmatory *Pottah* of 1823. Six witnesses were examined. Four of these witnesses deposed to the signing and delivery of that instrument by *Muddoo Soodun Sandial*. Among the other witnesses, one proved the *dakhilas* for rent given by the late *Zemindar*, Mrs. *Harris*; another, who was at the time in the Respondent's service as *Mooktear*, proved the signing the *dakhila*, which bore the name of the first *Ijardar* of the late *Maharajah*; and a third proved the signing and granting the three other *dakhilas*, bearing the name of the second *Ijardar* of the late *Maharajah*; and each of which *dakhilas* acknowledged the *Mouroosee* tenure, or *Mouroosee jumma* (perpetual rent), under which the land in question was held.

The hearing of the suit came on before *Ray Ram Lockun Ghose, Bahadoor*, the Principal *Sudder Ameen*, who considered the *Pottah* a forged document, and on the 19th of *November*, 1857, a decree was pronounced by him in favour of the Respondent at an enhanced rent of Rs. 822. 3., which enhanced rent the Appellant was decreed and ordered thereafter to pay in respect of the lands in question.

The Appellant appealed from this decree to the *Zillah* Court of *Nuddea*, and an appeal was also brought against a portion of the *Sudder Ameen's* decree by the Respondent.

The hearing of the two appeals took place on the 21st of *July*, 1858, when the Judge, Mr. *A. Littledale*, made a decree, the material part of which was in these terms:—'The Plaintiff sues to re-assess certain lands in the occupancy of Defendant, in accordance with the rates of the *Pergunnah*. The Defendant denies his right to do so, on the ground of her holding

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the lands under a *Mocurrery* lease, granted to her deceased husband's father in 1230 by a former proprietor, *Muddoo Soodun Sandial*, in recognition of a similar lease granted to Mr. *Seaton* before the Decennial Settlement, by the ancestors of the Plaintiff, who were at that time owners of the estate. The question admits of two points for inquiry. First, whether the validity of the *Mocurrery* lease granted in 1230 is satisfactorily proved; secondly, whether, irrespective of that lease, the right of Defendant to hold the lands without re-assessment is established. The objections taken by the Principal *Sudder Ameen* against the document, on account of incorrect spelling observable in it, are, in my opinion, weak and unimportant. It is urged on the part of the *Rajah* that it neither bears the seal of the grantor nor the names of any persons as subscribing witnesses. The first of these objections is of more weight than the second, and is entitled to consideration. As to the second, it is not usual for leases to be signed by witnesses. The document in question, according to the date of it, was written more than thirty years ago, and, considering the length of time that has elapsed since its alleged execution, the appearance of it is calculated to raise strong suspicion as to its ever having been written at that period; and unless satisfactorily supported by other evidence, I do not hold it in itself entitled to credit. Four witnesses have come forward to swear to its genuineness; but that circumstance alone throws suspicion upon it: for it cannot be considered otherwise than surprising that it should so happen, that after the lapse of more than thirty years there should be found four persons who all remember to have been present at the execution of a document, which is not of such a very important nature as to cause

the recollection of it likely to be indelibly fixed on their memory; but, with the exception of the evidence of these witnesses, there is none of any other kind to support it. It is not shown to have been ever before produced; and there is not a document of any kind in which mention of it is made. Under these circumstances, I concur with the Principal *Sudder Ameen* in rejecting it as unworthy of credit. Coming now to the second point forming the subject of this issue, it is first argued on the part of the Defendant, that the Plaintiff is debarred from re-assessing the lands by reason of their being of the nature described in the fourth exception in section 26, Act, No. I., 1845. Of this there is no proof, the original lease under which the lands are said to have been granted not being forthcoming. The Pleader on the part of the Defendant next refers me to the *Sudder* Court's decision, in the case of *Janubee Dassee*, on the 27th *May*, 1848, p. 475, which he urges is of a nature very similar to the present suit. In that case the Plaintiff was not a purchaser at a sale made for arrears of revenue; whereas in this suit the Plaintiff is the successor (by right of purchase) of one who was such, and consequently stands in his place, and must be held as entitled to exercise the same rights. Now, the simple question is whether (the authenticity of the alleged lease of 1230 by *Muddoo Soodun Sandial* not being established) the Defendant can be considered to have proved her right to hold the lands on a fixed *jumma*, or not? She has produced no grant or document constituting the original *Mocurrery* tenure, and has failed to prove the payment of a fixed *jumma* for twelve consecutive years previous to the Decennial Settlement, or for a period of sixty years. Granted

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that it has not been shown that Defendant has ever paid more than a *jumma* of Rs. 64. 1. 12, and that such has been stated to be the case by the Plaintiff's predecessor, Mrs. *Harris*, that cannot be, in the absence of all proof as to the lands having been held as *Istemraree* or *Mocurrery* at a fixed *jumma* more than twelve years before the Decennial Settlement, or for sixty years at that rent, any bar to the Plaintiff's right to enhance the rent of the lands. The only documentary evidence produced in support of the payment of the alleged fixed *jumma* are seven *dakhilas* for a period commencing from 1250. I consider, therefore, that on this second point there is an entire failure of proof in favour of the Defendant, and that the Plaintiff's right to enhance the rent of the lands is clear;"—and with the exception of a variation of the amount of that enhanced rent the *Zillah* Judge confirmed the *Sudder Ameen's* decree.

The Appellant presented a petition of special appeal to the *Sudder Dewanny Adawlut*, stating therein the following grounds of appeal:—First, that although the reasons contained in the decision of the *Zillah* Court for rejecting the *Pottah* of 1230 B.S. were defective and groundless; yet, independent of that, when possession from ancient times by payment of a *Mocurrery* rent had been proved, and the *Pottah* of 1230 could not but be deemed to be worthy of confirmation, then no assessment of rent could take place, either by law or justice. That, in fact, it clearly appeared that one fixed rent was uniformly paid from the time of Mr. *Seaton*, who was appointed Collector of *Zillah Nuddea* in 1797. That under such circumstances, a suit for assessment of rent could not, either by law or justice, be right or

proper. Second, that Mrs. *Harris*, of whose rights the Plaintiff was a private purchaser, had in her petition, dated 7th *Bysack*, 1251, distinctly acknowledged that, from the time of Mr. *Seaton*, the rents of this land had been regularly paid at Rs. 64. 1.12; consequently the Plaintiff, who represented her, could never possess the right to assess the rent. Third; that *Maharajah Sreesh Chunder Roy*, the father of the Plaintiff, had in a *kyfeut* dated the 6th *Falgoon*, 1253, and in a petition dated 18th *Aughrun*, 1252, after acknowledging the *Mouroosee* right and fixed rent, prayed to obtain the same, and for that reason the suit for assessment should be dismissed.

The hearing of the special appeal took place before Messrs. *A. Sconce* and *H. V. Bayley*, two of the Judges of the *Sudder Dewanny Adawlut*, and on the 26th of *March*, 1859, the following judgment was delivered :—The first point in the special appeal is, that as the under-tenure existed about the time of the Permanent Settlement, the Plaintiff could only carry an order for enhancement on proof that it was liable to be enhanced under the provisions of cl. 1, sec. 51, Reg. VIII. of 1793. But this plea obviously falls from its own statement. The word used is "about," that is, it is assumed that the lands in question was first granted to Mr. *Seaton*, the Collector of the district in 1797; but the Petitioner can only claim the support of the law quoted, on the assumption, that her tenure existed at the time of the Permanent Settlement, not seven years later. And, secondly, it is contended, that the suit is barred, as Plaintiff's predecessors in the estate admitted the existence of the tenure. But we find no admission to sustain this plea. *Harris*, a former proprietor,

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once remarked in a petition, that the tenants had paid rent as they chose; and in another petition, the Plaintiff's father spoke of the tenure as a *Mouroosee jumma*; but we have no intimation at all that any of the proprietors of the estate had recognized the existence of the tenure under distinct terms as to the land comprised in it, and the rent which it bore.

As the rules of the *Sudder Dewanny* Court with respect to the value of the subject-matter in dispute prevented an application being made to that Court for leave to appeal to *England*, the Appellant, without applying there, presented a petition for leave to appeal to Her Majesty in Council, which, in the circumstances, was granted (*a*).

The appeal came on in the first instance on the 28th and 30th days of *November*, 1863, when the genuineness of the original *Pottah*, dated the 23rd *Bysack*, 1230 (4th May, 1823,), being impeached by the Respondent as a fabricated document, their Lordships (*b*) directed the appeal to stand over for that document to be transmitted from *India* (*c*).

(*a*) See case reported on this point, *nom.* Sree Mutty Ranee Surnomoye *v.* Maharajah Sutteeschunder Roy, 8 Moore's Ind. App. Cases, 165.

(*b*) Present:—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. Sir John Taylor Coleridge.

Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

(*c*) See the cases of Mussamat Khoor Konwur *v.* Baboo Moodnarain Singh, 9 Moore's Ind. App. Cases, 10; McCarthy *v.* Judah, 12 Moore's P. C. Cases, 47; and Mason *v.* The Att. Gen. of Jamaica, 4 Moore's P. C. Cases, 228, in which similar Orders to transmit original documents impeached, as in this case, were made.

This was accordingly done and the appeal was again argued.

The Attorney-General (Sir *R. Palmer*), and Mr. *Leith*, for the Appellant.

This question is of great importance, as it affects numerous other persons like the Appellant holding under ancient tenures similar to the one in suit. It is submitted, that the decrees of the *Zillah Sudder* Courts appealed from cannot be sustained. By those decrees it was declared, that the Plaintiff, a remote purchaser by private contract, deriving title through a purchase of the *Zemindary* at a public sale to realize arrears of Government revenue, was "entitled to exercise the same rights" as the last-mentioned purchaser, including the extraordinary powers given by the Regulations to purchasers at Government sales for arrears of revenue to avoid and annul sub-tenures created since the Decennial Settlement, but, even if the decree rightly decided the general principle, which we deny, it was wrong in applying the provisions of the public sale law contained in sec. 26 of Act. No. I. of 1845 of the Legislative Council, those provisions being restricted to purchasers of estates sold under that Act, which was not the case in respect to the *Zemindary* of the Respondent. Regulation XI. of 1822, was the sale law under which the *Zemindary* of the Respondent had been previously sold in the year 1823, to realize arrears of Government revenue, and from that Regulation the powers of the purchaser, *Muddoo Soodun Sandial*, to annul or avoid such tenures were exclusively derived. Two important considerations arise upon the construction of secs. 30, 32, and 33, of Reg. XI. of 1822. First, it is a penal Regulation,

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and must be construed strictly, or equitably in favour of the sub-tenant. Secondly, it declares that the original purchaser "may" exercise this extraordinary power, but this discretion, we submit, must be within a reasonable time after the purchase, and that such right would be absolutely barred after twelve years by the Regulation of Limitation III. of 1793, sec. 14; but Reg. XI. of 1822, which was in force at the time of the sale, has been repealed by Act, No. XII. of 1841, sec. 1, without any attempt by the original purchaser to exercise the powers conferred by the last-mentioned Regulation, long before the Plaintiff took any step to exercise the same. The new or substituted powers given by that Act are restricted to purchasers of estates sold under it. The *onus* was upon the Respondent, to prove that as *Zemindar* he was entitled to enhance the rent of this ancient tenure, Reg. VIII. 1793, sec. 51, cl. 2, which he failed to do.

Next, with respect to the merits. It appears by the evidence that the lands had always been held as *Mouroosee Istemraree* by the Respondent and those under whom she derived title, as an ancient hereditary tenure created previous to the Decennial Settlement, subject only to the payment to the *Zemindar* of an uniform fixed rent, and the same rent has also been paid by five tenants successively since *Seaton's* grant. The Appellant has no power of enhancing a fixed rent, S.D.A. Rep., Vol. 11, p. 515, year 1848; S.D.A. Rep., Vol. 16, p. 365, year 1853. Again, the purchaser of the *Zemindary* at the public sale and those who subsequently became proprietors thereof, from whom the Respondent derived title, have admitted and confirmed

the ancient hereditary title of the Appellant to hold the lands in question of the *Zemindary* at a uniform invariable rent, payable to the *Zemindar*. A possessory title is made out by the Appellant, and the Respondent is estopped by his own acts and proceedings from disputing the right and title of the Appellant to hold the lands as an ancient hereditary tenure at a uniform fixed rent.

With regard to the evidence, the case divides itself into two heads, first under the confirmatory *Pottah*, and secondly, the evidence of tenure, independently of it. Now, we submit that the confirmatory *Pottah* of *Muddoo Soodun Sandial*, after his purchase at the public sale, was sufficiently proved by the evidence of the attesting witnesses, and moreover that no evidence was given by the Respondent to contradict them, or to show that the signature to the *Pottah* was not in the grantor's handwriting. But secondly, without such *Pottah*, even if it be a fabricated document, the other evidence was sufficient to show that the lands were held at an unvarying yearly rent.

Mr. *Forsyth*, Q. C., and Mr. *Field*, Q. C., for the Respondent.

First, the Respondent deriving his title under *Muddoo Soodun Sandial*, the purchaser at a Government sale under *Ben.* Reg. XI. of 1822, for arrears of revenue, is entitled to enhance the rents of the lands in question, and such lands were liable to be assessed by the Respondent at the current *Pergunnah* rates. The Respondent has acquired all the rights which *Muddoo Soodun Sandial* had when he purchased the *Zemindary* in 1823. By Reg. XLIV. of 1793, sec. 5, such a tenure upon the Government sale, ceased

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ipso facto to exist without any act being done by the purchaser; and the Respondent, as subsequent purchaser by private contract, is entitled to avail himself of that enactment, as he has the same rights as the "purchaser at public sale" mentioned in the 5th section, and by this Regulation, which is not repealed, to cancel the lease. This lease is not, as contended by the Appellant, a *Mouroosee*, or inheritable tenure. In the answer the Appellant calls the lands *Mocurrery* (fixed) and *Istemraree* (perpetual). *Wilson's* Glos. It may be that the Court below was wrong in applying the provisions of sec. 26 of the Act, No. I. of 1845, to this case, as it is restricted to sales for Government arrears made under that Act, and, therefore, could not apply to a sale made in 1823, but that arose from the Appellant referring to that Act in her answer. The cases cited by the Appellant do not apply.

Second, there is no evidence of a grant of any *Pottah* at a fixed and invariable rent to Mr. *Seaton* at any time before or since the Decennial Settlement. The alleged grant of a confirmatory *Pottah* by *Moodoo Soodun Sandial* bears on the face of it evidence of being a fabricated document, and the witnesses examined in support of it, as was held by the Court below, are wholly unworthy of credit. If the *Pottah* was not made previous to the sale, the purchaser and those claiming under him hold the *Zemindary* freed of the tenure.

The Attorney General in reply:

Section 5 of Reg. XLIV. of 1793, which the Respondent relies on as having *ipso facto*, upon the sale of the *Zemindary* in 1823, cancelled the

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Mouroosee Istemraree Pottah under which we hold, is qualified by section 7 of the same Regulation, and at the most, according to a strict construction of those sections, empowers the purchaser to enhance the rent upon equitable principles. In fact, that Regulation was passed to free purchasers from improvident grants made by *Talookdars*, and to set them free from such obligations. But section 5 of that Regulation if not expressly, is impliedly, repealed by Reg. V. of 1812, sec. 9, and XI. of 1822, sec. 30, 32 and 33, so far as respects hereditary tenures giving a transferable right. The hardship upon grantees and subordinate interests by Reg. XLIV. of 1793 was so great that an Act was passed in 1859 to modify it. That Act, however, was not in force when this decree was made. Supposing the confirmatory *Pottah* to be forged and the evidence of the witnesses in support thereof unworthy of credit, that instrument may be left out of consideration, as the other independent evidence of this property being an ancient tenure held at an invariable fixed rent is conclusive.

23rd July, 1864.

The judgment of the Lords of the Judicial Committee, after being reserved, was now delivered by

The Right Hon. THE LORD JUSTICE TURNER.

This was an appeal from a decree of the *Sudder Dewanny Adawlut* at *Calcutta* of the 26th of *March*, 1859, from a decree of the Judge of the *Zillah* Court of *Nuddea*, in *Bengal*, of the 21st of *July*, 1858, confirming substantially, a decree of the Principal *Sudder Ameen* of *Nuddea*, in *Bengal*, of the 19th of *November*, 1857. The suit was originally brought

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by the Respondent's father, and the relations of the parties to each other were those of *Zemindar* and *Talookdar*, the Appellant holding as mesne tenant a portion of the *Zemindary*. The object of the suit is to enhance the rent at which the Appellant holds that portion, and no question is made upon the Respondent's general title, nor upon the relation in which the Appellant stands towards him. She does not dispute his right, under other circumstances, to bring this sort of action against her, and their Lordships, therefore, do not enter into the question whether the action has been properly so brought. They give no opinion on that point. What the Appellant insists upon is, that this present action must fail because her tenure is hereditary and at a fixed rent, which the *Zemindar* has no power to enhance.

It will be convenient in the first place to state what, upon the evidence, their Lordships consider to be established as to the Appellant's title, omitting for the present some parts of the evidence on which she relies, and to which too much importance has been, as it appears to their Lordships, attached in the Courts below. The interest which she represents was first created by grant in favour of a Mr. *Seaton* at some date prior to the commencement of this century. On parts of the land comprised within his grant he laid out gardens and erected factories and other buildings, but there is no direct evidence that the grant was made for these purposes. He appears to have been a Civil servant of the East India Company; and after some years, when leaving *India* for *England*, he sold the whole property to the grandfather of the Appellant's husband; on his death it

descended to the father, and thence in due course to her husband, from whom she has inherited it as his widow. A portion of the land during this course of years has been granted to the Government, and a public College erected thereon. And during the whole time of the occupation of these five tenants, the same rent has always been paid. Upon this state of facts the Appellant contends that she is not merely a *Mouroosee* tenant, that is, one holding by hereditary tenure, but that she holds at a fixed rent, and under such circumstances as protect her from any enhancement of it.

The state of facts on the part of the Respondent is this: It appears that while *Hurrenauth Roy, Bahadoor*, the father of the Appellant's husband, was in possession, the Government revenue payable by the *Zemindary* fell into arrear, and the property was, therefore, put up to public auction; one *Muddoo Soodun Sandial* became the purchaser, and he acquired the rights which the then subsisting Regulations gave to a purchaser at such a sale. After some time he sold the *Zemindary* by private contract to Mr. *Harris*, from whom, on his death, it passed to his widow; from her it was purchased by the *Maharajah Srees Chunder Roy*, now deceased, who in *August*, 1856, commenced the present suit, and on his death the Respondent, inheriting the *Zemindary*, has continued it.

Upon this state of facts the Respondent contends, that as he claims under *Muddoo Soodun Sandial*, he has acquired all rights which *Muddoo Soodun Sandial* had, and that as he purchased at a Government auction, he was entitled by the Regulations then in

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force to cancel the lease under which the Appellant's ancestor was holding, and of course to impose new terms as to the rent.

It is, as it seems to their Lordships, necessary to the Respondent's success, that *Muddoo Soodun Sandial* should have had in him, at the time when he sold to Mr. *Harris*, the rights above stated, so that he himself might at that time have enhanced the rent of these lands; that these rights should have passed to Mr. *Harris*, and the subsequent purchasers of the property down to and including the Respondent's father; and that they either could not have been or have not been in fact waived by the Respondent's father or by any one of the prior owners, for unless this be the case, their Lordships see no ground on which the hereditary tenure could be disturbed or the rent enhanced.

The reliance of the Respondent is on some one of the Regulations which have been made at different times in regard to purchasers at Government auction sales in the case of *Zemindaries*, from which the Government income has not been duly paid. These Regulations have been couched in different language, but all with the same policy in view, as regards the present question. It has been assumed, as the foundation of them, that the default of the *Zemindar* may have been occasioned by improvident grants of *Talooks* and other subordinate tenures at inadequate rents: that this was in breach of the condition on which the fund was originally created by the Sovereign Power; and the purchaser, therefore, has been set free from the obligation of these grants, with certain specified exceptions, and with certain limita-

tions of his power as to new tenancies to be created. These laws, however, cannot but occasionally operate very hardly on the grantees of subordinate interests, and they have, therefore, been materially modified by an Act of 1859, not in force when this decree was made, and not, therefore, directly applicable to it; but such Regulations must on general principles receive a strict construction. There seems to have been doubt in the minds of the Respondent's advisers on which of these Regulations his case could safely be rested, and it would appear from the proceedings in the Court below that it was intended to rest it on Regulation Act, No. 1 of 1845, which certainly would not have supported it, because the sale relied on was not effected under that Regulation, and its provisions are limited to sales so effected. Upon the argument before their Lordships the Counsel for the Respondent relied on the fifth section of Regulation XLIV. of 1793, which is the earliest of the Regulations on this subject, and they contended that, although subsequent Regulations upon the subject have been passed in different language and repealed, this fifth section of Regulation XLIV., 1793, has never been repealed, but was in force at the time when the sale in question was made and this action was commenced. Whether upon the true construction of all the Regulations taken together this particular section ought to be taken to have been repealed or not, their Lordships do not think it necessary to determine. They assume in favour of the Respondent that it stands unrepealed and in full force, and will deal with the case upon that footing. The language of this section is no doubt favourable to the Respondent's case. It provides that when a *Zemindary* is sold at a public

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sale for discharge of arrears due from the proprietors to the Government, "all engagements which such proprietors shall have contracted with dependent *Talookdars*, whose *Talooks* may be situated in the lands sold, as also all leases to under-farmers and *Pottahs* to *Ryots* (with the exception of the engagements, *Pottahs*, and leases specified in sections vii. and viii.,) shall stand cancelled from the day of sale, and the purchaser or purchasers of the lands shall be at liberty to collect from such dependent *Talookdars*, and from the *Ryots* or cultivators of the lands let in farm, and the lands not farmed, whatever the former proprietor would have been entitled to demand according to the established usages and rates of the *Pergunnah* or District in which such lands may be situated had the engagements so cancelled never existed." But the seventh section of this same Regulation provides, that this is not to authorize the assessment of any increase upon the lands of such dependent *Talookdars*, as were exempted from increase at the Decennial Settlement of 1793.

Their Lordships do not, upon any evidence in the case, on which they think it safe to rely, see their way to the belief that the Appellant brings her case within the seventh section, but they cite it because it may have a bearing on the construction of the language of the fifth section. The Respondent contends that by the operation of the words "stand cancelled from the day of sale," the existing interests of the *Talookdar*, *ipso facto*, ceased to exist, without any act done by the purchaser; that it was incapable of confirmation or being set up by him or his successors; and that where, from the acquiescence of the purchaser or those claiming under him, the possession

had remained in the *Talookdar* and those claiming under him undisturbed, and the original rent had been received, no matter for how long a period, or through whatever number of mesne conveyances, it still remained a bare possession at the will of the *Zemindar* for the time being, and the rent always liable to enhancement. In this hard and literal construction of the words cited above, their Lordships do not concur. They think, that their meaning is properly to be collected from the policy and intent of the Regulation, from the language used in other parts of the same section, and from the seventh section, which creates an exception out of the provisions of that section. English lawyers are familiar with this principle of construction applied as early as the time of Lord *Coke* (see 1st Inst. 45) to the disabling Statute of 1*st Eliz.*, c. xix. sec. 5, and in several modern reported cases between landlord and tenant, on clauses of forfeiture in leases. Words which make a Bishop's grant "utterly void and of none effect to all intents, constructions, and purposes," have been held not to prevent the grant from being good and binding on the grantor, and in some cases confirmable by the successor; and so a proviso in a lease, that it should be void altogether in case the tenant should neglect to do a certain act, has been held only to make it voidable at the option of the landlord. Their Lordships do not cite these as authorities governing this case, but mention them only as illustrating a general principle of construction which for its justice, reasonableness, and convenience, must be considered of universal application. In the present case the object of the Government was that

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the *jumma* should be duly paid, and that the means of paying it should not be withdrawn by the improvident grants of the *Zemindars* who had made default; but cases of default might often arise where no improvident grant had been made, where the *Talookdars* and the *Ryots* held at proper rents, and the default was owing to extravagance, mismanagement, or other causes,—in such cases the Government cannot be supposed to have intended a wanton and unjust disturbance of vested interests. It is true that the section makes no distinction in terms between the two classes of cases, and it would be unsafe in construction to make any such; but the consideration furnishes reason for such limitation, both as to time and extent of operation, as the words will admit, indeed seem to require, in order to give effect to the whole sentence. Now, looking at what follows in the same clause, it is obvious that no such absolute cancellation was intended, for the power expressly and affirmatively given to the purchaser supposes the *Talookdars* and the *Ryots* to remain in all respects as before, except that they become liable to a certain limited increase of rent, "according to the established usages and rates of the *Pergunnah* or district;" words in themselves showing, that the section was directed to cases in which grants had been made with reservations of rent below those usages and rates. It is to be observed also that in terms this power is given only to the purchaser himself, which would ordinarily suffice to remedy the mischief in contemplation. The language of the exception, too, in section seven shows, that what was aimed at by section five, was not the destruction of

tenure, but the increase of rent, under certain specified and equitable limitations.

The conclusion at which their Lordships have arrived as to the construction of the section is this—that a power was given by it to the purchaser at a Government sale for arrears to avoid the subsisting engagements as to rent, and to increase the rent to that amount at which, according to the established usages and rates of the *Pergunnah*, or District, it would have stood had the cancelled engagement so avoided never existed. This gives it a just and reasonable operation, and virtually it would have had none, when the existing rent was already according to the usages and rate of the *Pergunnah*.

This conclusion is of great importance in the determination of the remaining questions. The sale to *Muddoo Soodun Sandial*, according to the Respondent's own case, took place some time before 1823, and he found those under whom the Appellant claims holding the land at an old rent of Rs. 64. 1a. 12p.; he did not attempt to disturb the occupation or increase this rent, but received it during all the time he remained owner. He sold by private contract to Mr. *Harris*, from whom it passed to his widow, Mrs. *Harris*, and from her again by private contract to the Respondent's father, *Maharajah Sreesh Chunder Roy*, as has been already stated. During all this time (and for a considerable period before, so far as appears indeed from the very creation of the tenure —more than sixty years ago), the same rent has always been paid; and there is no evidence that when first imposed—nay, even when the purchase was made, it was not a perfectly adequate rent for the

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property. Great changes in the value of property have now arisen, and the Respondent demands by his plaint an annual rent of Rs. 1,470, or nearly twenty-three times the amount of the original rent, according, as he states it, to the actual rate current in the village.

If the section in question did not authorize the purchaser to disturb the possession, and left him an option to confirm the existing rate of rent, there seems to be the strongest evidence that he exercised that option in favour of the *Talookdar;* and even if the same rights passed from him unimpaired to Mr. *Harris*, and in succession to those who claim under him, the evidence is equally strong—nay, as regards Mrs. *Harris* personally, it is stronger. It is, therefore, unnecessary to decide whether the section is to be construed as giving a power only to the purchaser, or to him and his heirs, or a power attached to the *Zemindary*, which passed to subsequent purchasers. Their Lordships, moreover, observe that the power given is to collect what the former proprietor would have been entitled to demand, if the cancelled engagement had never been made; words which seem to point to something to be done on the change of ownership, not to something to be done after any indefinite lapse of time; and, as before remarked, in terms the power is given only to the purchaser himself, as to whom reasons might apply which would not extend to subsequent purchasers from him. Their Lordships, however, pronounce no opinion on this question, it not being necessary to decide it. They say no more than that a construction which would render the title to property unnecessarily uncertain, ought not, in

their judgment, to be given to a power of this description.

On examining the Regulations their Lordships are satisfied that the Respondent's case can rest only on the powers given by the section in question; and they are of opinion that those powers, assuming them to be in force, will not support the present action. They are glad to find that it is not their duty to support a claim which appears to them to be unjust. During the long period for which this property has been held at a small unvarying rent, it has been bought and sold, and changes and improvements have been made, no doubt at a considerable expense, and upon the faith of the rent to the *Zemindar* continuing unchanged: he has purchased while that state of things existed, and it must be presumed for a price calculated accordingly; and it is manifestly unjust that he should be allowed to disturb it.

It will have been observed that their Lordships have arrived at their conclusion without considering either the parol evidence of the Appellant, or a confirmatory *Pottah* produced by her as having been granted by *Muddoo Soodun Sandial*, which, if received by the Courts below, would have concluded the case in her favour. Both these Courts, however, treated the whole of the parol evidence as unworthy of credit, and the *Pottah* as a forged instrument; and their Lordships regret that on the fullest consideration they are not prepared to differ from them in these conclusions. When false witnesses or forged documents are produced in support of a case, the fact naturally creates suspicion as to

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the case itself; and if the evidence on which their Lordships act depended in any degree for its credibility or weight on such witnesses, or document, they would have paused as to their conclusion. The fact is not so, however, in the present case; their Lordships believe they have to deal with a just case foolishly and wickedly attempted to be supported by false evidence. This misconduct must not mislead them in the advice they will have to tender to Her Majesty, which will be that the appeal be sustained, the decrees complained of reversed, the pliant in the suit dismissed, and any costs which may have been paid by the Appellant in the Courts below re-funded, but that no costs of the appeal, or of any of the proceedings below, be allowed to the Appellant.

SEVVAJI VIJAYA RAGHUNADHA VALOJI KRISTNAN GOPALAR } *Appellant,*

AND

CHINNA NAYANA CHETTI . . . *Respondent.**

On appeal from the Sudder Dewanny Adawlut at Madras.

12th & 13th Dec. 1864.

Suit by *A.* to recover real estate in the possession of *B.* and of his predecessors, whose title had been unchallenged for forty-four years, on the ground that the estate was mortgaged only by *A.*'s ancestors, and that *B.* and those claiming under him were only usufructory mortgagees in possession. Held, that the *onus probandi* was on *A*, who could only succeed by the strength of his own title, and not by reason of the weakness of *B.*'s title.

If a party put in evidence in support of his title, documents proved to be forged, but the other evidence adduced by him is not impeached, the Court, in rejecting the forged documents, will take the unimpeached evidence into consideration, and if satisfied, adjudicate thereon.

Act, No. XVI. of 1853, c. 4, enacts, that no special appeal shall lie, nor shall any decision be reversed, altered, or remanded by any of the *Sudder* Courts upon the ground that the decision of any question of fact is contrary to, or not warranted by, evidence taken, or any probability deduced from the record. Held, that such enactment was to be carried to its full legitimate extent, except where the decree of the inferior Court is founded on an inference of law, when a special appeal lies to the *Sudder Dewanny Adawlut.*

THIS suit was brought in the subordinate Court of *Combaconum* by the Appellant, the *Zemindar of Madukur*, against the Respondent and others, to

* Present:—Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Master of the Rolls (The Right Hon. Sir John Romilly).

Assessors:—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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recover the village of *Udayamarttandapuram*, which had been in the uninterrupted possession of the Respondent and those under whom he claimed for upwards of forty-four years before the institution of the suit.

The case of the Appellant was, that one *Tayilaya* his grandmother, in the year 1805, mortgaged the village and the title deeds to one *Palaniyappa Chetti* for 300 *pons*, under a mortgage Bond, and put him in possession, stipulating that he should enjoy the same in lieu of interest, and restore the village on repayment of the mortgage money. The Respondent, on the other hand, relied on his length of possession, contending that *Palaniyappa Chetti*, through whom he claimed, became the absolute owner of the village under a Bill of sale, dated the 15th of *May*, 1805, executed by *Valoji Maikken Gopalar*, the Appellant's grandfather, in consideration of the sum of 250 *pons*, and he submitted, that the burthen of proof was on the Appellant to prove the allegation that the village was, as he alleged, mortgaged and not sold.

The plaint was filed in *September*, 1849, against *Parvatiachi*, the widow of *Palaniyappa Chetti*, *Selvanayaka Tevan*, his heir, *Selvanayaka Chetti*, *Subba Chetti*, and *Vaidilingar Chetti*, the sons of one *Gopala Chetti*, and the Respondent, *Chinna Nayana Chetti*. The plaint alleged that *Tayilaya*, through whom the Plaintiff traced his title, had, in the year 1805,

Thus when the Judge of the inferior Court stated that the inclination of his opinion was, that there had been a sale, but that the Defendant could not rely upon that defence, because he had attempted to strengthen his case by a forged Bill of sale, and that the estate, if not sold, must have been mortgaged, as insisted by the Plaintiff, and thereupon decided without further proof that the estate was mortgaged; such judgment was held not to be a finding of fact, but an inference of law, and analogous to a misdirection of a Judge to a jury, and, in such circumstances, a special appeal to the *Sudder Dewanny Adawlut* lies from such decree.

mortgaged the estate to *Palaniyappa Chetti*, and that the alleged Bill of sale in that year by the Appellant's grandfather, *Valoji Maikken Gopalar*, was a forgery, as he had died in 1799, before the date of the alleged Bill of sale, and prayed for the delivery back of the village on repayment of the mortgage money.

The Respondent alone appeared and, by his answer, relied on the fact that the estate in question had not been in the possession of the Appellant or his ancestors for the last forty-four years, but had been in the possession during that time, with the *mirassi* and other rights, of the first Defendant's husband, and then of the third Defendant's father, afterwards of the third Defendant, and the Respondent successively; that the Appellant's grandfather, *Valoji Maikken Gopalar*, had sold the village to *Palaniyappa Chetti*, by a Bill of sale dated the 17th of *May*, 1805, for 250 *pons*, and that the village had been registered in *Fusli* 1215 (1805), in his name, as the sole proprietor; that as the second Defendant was a minor, his mother and guardian, *Parvatattu Achi*, sold the village to the third Defendant's father, *Gopala Chetti*, on the 18th of *February*, 1813, for 250 *pons*, put him in possession thereof, and got it registered in his name as the sole proprietor; that *Gopala Chetti*, on the 16th of *July*, 1837, sold it to his son, the third Defendant, who continued in possession for a great number of years, having improved it at a great outlay; that the estate, having been for a long time in Defendant's possession by virtue of a mortgage lien derived from the third Defendant, was afterwards sold to him on the 13th of *July*, 1845, for Rs. 12,250, under a registered Bill of sale, and that the Respondent had further repaired and improved it at a large outlay. It was

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further insisted, that the suit was barred by cl. 4, sec. 18, *Mad. Reg.* II. of 1802; and that that Plaintiff's allegation that his grandfather died in 1799 was not true, and that he was alive in the year 1805.

The cause being at issue the Appellant examined witnesses to prove the alleged mortgage by *Tayilaya* to *Palaniyappa Chetti*, and of the demands and promises at different times to restore the village. The Respondent put in evidence, among other documents, the alleged Bill of sale by *Valoji Maikken Gopalar* to *Palaniyappa Chetti*, of the estate in question, dated the 15th of *May*, 1805, and the receipt of the same date. As the witnesses to this instrument were dead, three witnesses were examined to prove some of the attesting witnesses' handwriting. These instruments were challenged by the Appellant as forgeries.

The acting Judge of the subordinate Court of *Combaconum* (Mr. *G. M. Swinton*), by his decree, dated the 17th of *November*, 1851, declared that the estate was only mortgaged, and ordered the Respondent to relinquish the village to the Appellant on receipt of 300 *pons*, and to pay the Appellant's costs.

The Respondent appealed from his decision to the Civil Court of *Combaconum*, and among his grounds of appeal, again relied on the Bill of sale in 1805.

On the 26th of *October*, 1854, Mr. *Scott*, the Judge of the Civil Court, gave judgment on the appeal as follows. "I agree with the acting subordinate Judge in thinking that the Plaintiff's grandfather, *Valoji Maikken Gopalar* died before the date of the exhibits 3 and 4 (the Bill of sale and receipt of the 15th of *May*, 1805), and consequently that these documents must be considered as fabrications, the assumption now advanced by the Appellant, that

they were in reality executed by *Valoji's* younger brother, but were drawn up in the name of the elder, because the *mirass* was still registered in his name, being without any proof whatever. The Appellant has, therefore, failed to show that the village was sold to *Palaniyappa Chetti*, and if it was not sold, it must have been mortgaged, as contended by the Plaintiff, and I must, therefore, affirm that part of the decree of the lower Court which decides that the village was mortgaged. At the same time, judging from the various documents obtained by the Appellant from the Collector's Office, I am inclined to think that the village was sold, and that the Bill of sale has been lost, and I am of opinion, that the Appellant has broken down his own case by making it rest on title deeds that are evidently fabrications; he has resorted to forgery to establish his claims, and he must take the consequences of his own act. The Court is not at liberty to assume for him a position which he has himself rejected. Although, therefore, I affirm that part of the subordinate Judge's decree, I cannot concur with him in thinking that either justice or the practice of the Courts requires that a village, so greatly improved as to be worth upwards of Rs. 12,000, should be delivered up to the mortgagor for less than a twentieth part of the sum. The mortgagee is entitled to be remunerated for the improvements he has made, but for the purpose of ascertaining what they are, and in order that a fresh decree may be passed on that point only, I remand the suit to the Court of original jurisdiction. The parties will pay their own costs of appeal."

The Respondent presented a special appeal to the *Sudder* Court against the above decree of the Civil

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Court, but it was dismissed on the ground that the Court could not admit a special appeal, while the suit was remanded.

The suit being remanded to the subordinate Court, for the purpose of taking evidence in regard to the improvements by the mortgagee and those claiming under him, witnesses were called for that purpose by the Respondent.

The subordinate Judge (Mr. *Innes*), by his revised decree, decided that the decree originally passed should stand without alteration.

The Respondent appealed from this revised decree to the Civil Court, but the Civil Court dismissed such appeal.

Whereupon the Respondent presented a petition of special appeal to the *Sudder* Court for the following reasons; that the decree in the appeal which dealt with the title to the property, was erroneous. That the Civil Judge would evidently have found in Petitioner's favour, only for the Bill of sale and receipt. That no attempt had been made to show that these documents, if forgeries, were fabricated by him, and he submitted that his title, which was admitted by the Civil Judge to be sufficiently proved from other sources, could not be vitiated by the mere fact that two fabricated documents were handed over to him when he purchased the property. That the Plaintiff in ejectment must recover upon the strength of his own title, and that this had been found against him by the Civil Judge. That the Plaintiff's claim was barred by the Regulation of Limitations. That the decree of the Civil Judge was also erroneous, since the evidence proved that considerable sums had been laid out in improve-

ments, and that mere variance, or vagueness, as to the precise amount, did not justify him in utterly rejecting the claim.

On the 6th of *September*, 1858, an Order was made by the *Sudder* Court, admitting the special appeal.

After hearing the appeal, on the 5th of *March*, 1859, the Judges of the *Sudder* Court (consisting of Messrs. *Hooper*, *Strange*, and *Phillips*) reversed the decrees of the Court below and dismissed the suit, The material part of the decree was in these terms: —"In a case like the present, where there has been lengthened occupancy, with repeated transfer from one party to another, it was imperative on the Plaintiff to show that, during this long interval, his alleged rights had been acknowledged; but it is plain from the decree of the Civil Judge, that he has not accepted whatever evidence the Plaintiff may have adduced in proof of such recognition of title in him. The Civil Judge, in concurring with the Subordinate Judge that the Defendant's exhibits, Nos. 3 and 4 are forgeries, observes, that as the Defendant has failed to show that the land was sold to *Palaniyappa Chetti*, it followed that he must have received it on mortgage. The *Sudder Adawlut* cannot concur in such a conclusion. Indeed, in the next succeeding paragraph the Civil Judge himself demonstrates it to be untenable. He there records his opinion, based upon various documents obtained by the Defendant from the Collector's office, that the land actually was sold, that the Bill of sale has been lost, and that the Defendant has propped up his case with fabricated documents. The Civil Judge has thought that such resort on his part pre-

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cludes him from giving a decree in his favour. It is apparent to the *Sudder* Court that, owing to a presumed legal bar, the Civil Judge has given a decision on a point of fact against his own conviction. The *Sudder Adawlut* are, therefore, of opinion that there is no such bar in the case. The land has passed from hand to hand; and it is hard to fix the presumed forgeries upon the Defendant. He may very well have derived the documents as the muniments of title from the last vendor. Nor, in a case like the present, should the Plaintiff gain his cause upon the weakness of the evidence on the other side. But, as above observed, the Judge has found documentary evidence derived out of the Collector's records, establishing, in his opinion, the fact of the disputed sale; and it is clear to the *Sudder Adawlut* that the Defendant is entitled to the benefit of this opinion."

From this decree the present appeal was brought.

The Attorney-General (Sir *R. Palmer*) and Mr. *W. W. Mackeson*, for the Appellant.

First. A special appeal ought not to have been admitted by the *Sudder* Court, as none of the grounds allowed by Act, No. XVI. of 1858, with respect to special appeals, existed. It was not competent for that Court to reverse, or alter, the decree of the Civil Court, on any question of fact, upon the assumption that such decisions were contrary to or not warranted by the evidence taken in the suit, or upon any probabilities suggested by the *Sudder* Court.

Secondly, upon the merits, we submit the decree was erroneous. The estate was mortgaged by the Appellant's grandmother to *Palaniyappa Chetti* in the

year 1805, and could not have been lawfully sold by her. The right of redemption was kept alive by demands upon and admissions made by the mortgagee, or those claiming under him ever since. The Bill of sale and the receipt of the 15th of *May*, 1805, were satisfactorily proved to be forgeries, and there is no other evidence from which any valid sale could be established or even presumed.

Sir *Hugh Cairns*, Q.C., and Mr. *Pontifex*, appeared for the Respondents.

Their Lordships, however, without calling upon them, delivered judgment by

The MASTER OF THE ROLLS.

Their Lordships are of opinion that the decree of the *Sudder Dewanny Adawlut* must be affirmed.

Two questions are raised in this appeal; first, whether the *Sudder Dewanny Adawlut* had power under the Act, No. XVI. of 1858, to permit a special appeal in this case; and secondly, whether on the merits, the decision of the inferior Court was correct. On both these points their Lordships concur with the *Sudder Dewanny Adawlut*; but in order to explain the view they take of the application of the Act, No. XVI. of 1858 to this case, it will be convenient to refer to the facts of this appeal, and in doing so to consider the merits of the case.

It is a suit instituted by the Appellant in *September*, 1849, to recover possession of a village which has been held without disturbance since the year 1805. The Appellant alleges, that in the month of *May* in that year *Tayilaya*, the widow of the former owner, *Valoji Gopalar*, who had no power

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to sell, made a mortgage of this village for 300 *pons* to *Palaniyappa Chetti*, and put him into possession on an agreement that the usufruct of the village should be set off as against the interest on the mortgage.

To succeed in such a case as this, it is obvious that the burthen of proof lies on the Appellant.

A Plaintiff who alleges that his ancestor, forty-four years ago, made a mortgage to the ancestor of the present possessor of a property, and by virtue thereof seeks to dispossess the present possessor, must prove his case clearly and indefeasibly. He must succeed by the strength of his own title, and not by reason of the weakness of his opponent's. It would be contrary to all principles of law and justice, that upon such an allegation, a Plaintiff should be able to require the present possessor to prove his title, and if he failed in doing so to dispossess him of the land in question.

The first material thing, therefore, is to examine how far the Plaintiff's evidence establishes the fact of the mortgage. The original mortgage is not produced; no copy of it is produced; it never was registered. The whole of the evidence respecting it is that of three witnesses, *Ananda Pillai*, 76 years, *Tambi Servagaram*, sixty-eight or sixty-nine years, and *Venkatasesha Ayyar*, seventy years, who all swear that a mortgage of the village in question, for 300 *pons*, was executed by *Tayilaya*, in her house, at 10 or 11 o'clock in the morning, and that she received the 300 *pons* in *Tanjore fanams*.

Notwithstanding the minute accuracy of these witnesses' recollection, their Lordships are of opinion, that it would be too dangerous to act upon this

evidence, if unsupported by any other testimony, in order to disturb an uninterrupted possession of forty-four years.

There is also evidence of some applications by the Plaintiff, and by the preceding alleged owners of the equity of redemption, to redeem the mortgage. But with this exception, the Plaintiff's case is in fact wholly unsupported by any other evidence adduced by him. The Court of original jurisdiction seems indeed principally to have relied on the Defendant's evidence for the support of the Plaintiff's case. It may undoubtedly sometimes happen that the evidence adduced by the Defendant, instead of supporting his case, may establish that of his adversary. It remains to be examined whether that is so in the present instance. The Defendant alleges that *Valoji Gopalar* sold the village to *Palaniyappa Chetti*, through whom the Defendant claims. He puts in evidence a Bill of sale purporting to be executed by *Valoji Gopalar* and supports it by many witnesses. This document is clearly shown to have been a forgery, and it is not only sufficient to destroy this supposed Bill of sale, but to throw discredit on the oral testimony which the Defendant adduces. But their Lordships are of opinion that it goes no farther, and that it does not follow, because the Bill of sale adduced by the Defendants is forged, that the evidence adduced by the Plaintiff must be correct. It might be possibly an advantageous rule if, as Mr. *Scott* expresses in his judgment, that where a party "has resorted to forgery to establish his claim, he must take the consequences of his own act, and that the Court is not at liberty to assume for him a position which he has himself rejected" (*a*).

(*a*) Ante p. 155.

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But their Lordships are unable to arrive at that conclusion, and are apprehensive that if such was the practice adopted, some cases might occur in which the Court could not determine the point in issue in favour of either party. We think also, that in this case, even if this rule were adopted, it is pushed too far, as, though the Bill of sale is found to have been forged, the knowledge of the forgery is not brought home to the Defendant. We find also in a recent case, *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy* (*a*), this Committee gave effect to the Defendant's title, although a document by which she sought to strengthen it was found to be a forgery.

The evidence which is not susceptible of being forged is *primâ facie* strongly in favour of the Defendant.

Possession of the village, by persons through whom the Defendant claims, is proved by accounts registered in the years 1805, 1806, 1807, 1829, 1839, 1844. An *arzee* of 23rd of *March*, 1816, addressed by the *Tashildar* of *Mannargudi* to the Collector of *Tanjore*, and the answer of the Collector of the 2nd of *April* following, speaks distinctly of the village having been sold to *Gopalar Chetti* in 1804, a year previous to the period alleged by the Plaintiff as the date of the mortgage by the *Tayilaya*.

We think the preponderance of evidence is in favour of the Defendant, even if the burthen of proof lay on him. However much the want of trustworthiness in the evidence of cases from *India* is to be regretted, we cannot by reason of the proof that a document adduced by one party is forged, transfer the property in which he and those through whom he

(*a*) Ante p. 124.

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claims have been in possession at the date of the suit for forty-four years, to another, who has not, in the opinion of their Lordships, established any right to it himself. If, therefore, the case had come before their Lordships, unfettered by any question on the Act, No. XVI. of 1853, they would have had no hesitation in concurring with the *Sudder Dewanny Adawlut*, in holding that the Plaintiff had not established his case, and that his plaint ought to be dismissed.

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The remaining point on which the Appellant mainly relies is, however, one of great importance; and, if determined in his favour, supersedes the question of merits.

The point is that by reason of the proviso in the 4th paragraph of the 4th clause of the Act, No. XVI. of 1853, the *Sudder Dewanny Adawlut* had no power to admit the special appeal. The words of the clause are these: "Provided always, that no such special appeal shall lie, nor shall any such decision be reversed, altered, or remanded by any of the said *Sudder* Courts, upon the ground that the decision of any question of fact is contrary to or not warranted by the evidence duly taken in the cause, or any probability deduced from the record."

Their Lordships think it of great importance that this provision should be carried to its full legitimate extent, and that no appeal should be allowed on account of difference of opinion as to the value of evidence. But their Lordships concur with the *Sudder Dewanny Adawlut* that this is not the present case. Mr. *Scott*, whose judgment is appealed from to the *Sudder* Court, does not find, as a fact, that the Plaintiff had proved the mortgage he alleged. On the contrary, he states the inclination of his opinion

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to be, that the evidence proved a sale, but that the Defendant was not at liberty to rely on that evidence by reason of his having adduced and relied on a forged Bill of sale. What Mr. *Scott* does find is a conclusion of law. His words are these: "The Appellant has failed to show that the village was sold to *Palaniyappa Chetti*, and if it was not sold, it must have been mortgaged, as contended by the Plaintiff, and I must, therefore, affirm that part of the decree of the lower Court which decides that the village was mortgaged" (*a*).

The *Sudder Dewanny Adawlut* considered this not to be a finding of fact, but an inference of law, and accordingly allowed a special appeal. Their Lordships concur in this view. By way of testing the accuracy of it, it may be supposed that the case had been tried before a jury in this country, and that the Judge had directed the jury in the words of the Civil Judge which I have just read, namely: "The Appellant has failed to show that the village was sold to *Palaniyappa Chetti*, and if it was not sold it must have been mortgaged, as contended by the Plaintiff. It is your duty, therefore, to find that the village was mortgaged."

Their Lordships entertain no doubt that a Bill of exception or misdirection to the jury would have been sustained if such direction had been given. That is, that such a statement would have constituted a misdirection in point of law, upon the reliance of which, the jury found the fact of the mortgage.

Their Lordships, therefore, are of opinion, that the Act, No. XVI. of 1853, does not prevent a special

(*a*) Ante p. 155.

appeal in this case, and that the *Sudder Dewanny Adawlut* was right in admitting the appeal, and dismissing the Plaintiff's plaint. This appeal will be dismissed, with costs.

JOSIAH PATRICK WISE AND AYNUN BEBEE - - - } *Appellants,*

AND

BHOOBUN MOYEE DEBIA CHOWDRAINEE AND RAJENDUR KISHORE ACHARJ } *Respondents.**

On appeal from the Sudder Dewanny Adawlut at Calcutta.

24th & 26th Feb. 1863; and 1st & 2nd March, 1865.

THESE were two appeals by the same parties from decrees of the *Sudder Dewanny Adawlut*. The first

A purchaser of a *Zemindary* at a Government sale under *Ben.* Reg. XI. of 1822, to satisfy arrears of revenue, is entitled as purchaser, first, to immediate possession of such lands as were at the time of the sale in the possession of the *Zemindar*; and secondly, under secs. 30, 32, and 33 of that Regulation, to set aside by suit all sub-tenures created since the Decennial Settlement by the *Zemindar* last seized, or his predecessors.

Mousahs, forming a *Shikmee Talook* before the Decennial Settlement

* Present at the hearing of the first appeal: Members of the *Judicial Committee*—The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

At the second appeal: The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner.

Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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appeal was brought from a decree of the *Sudder Dewanny Adawlut* of *Calcutta*, dated the 30th of *July*, 1858, which reversed a decree of the *Zillah* Court of *Mymensingh* in a suit instituted by the second Respondent to obtain possession and eject the Appellants from twelve and a half *annas* shares of *mouzahs*, *Dakin Khalikaprosad Surrabad*, and other *mouzahs*, which were held together as a *Shikmee Talook*, dependent on the *Zemindary*, *Tappalo Cooreekhuy*, under an ancient hereditary *Mocurrery* tenure, at a fixed and perpetual annual *jumma*, reserved and made payable by the *Talookdars* to the *Zemindar* for the time. The second appeal was from a decree of the same Court of the same date, made in another suit brought by the first Respondent to recover an eight *annas* share of part of the same *mouzahs*.

The two suits, the subject of the appeals, were in substance identical, the parties being the same, and, although relating to different parts of the property, were under the same title, and substantially one suit.

The facts of the case and the principal grounds of the argument sufficiently appear in the judgment.

The Appellant's contention was, first, that the

and held of the *Zemindar* by *Mocurrery* tenure at a fixed rent, are not liable to resumption by a purchaser under Reg. XI. of 1822, secs. 30, 32, and 33.

A sale took place in 1833. Possession of the *Mouzahs* was taken from the purchaser in 1841, who shortly afterwards died, leaving a widow, who, under a power from her deceased husband, adopted an infant son. In 1853 she instituted a suit for recovery of the *Mouzahs*: Held that the death of the purchaser and minority of the heir took the case out of the *Ben.* Reg. of Limitations III. of 1793.

Although in Indian proceedings the presumption in favour of the genuineness of documentary evidence is very weak, yet there is no presumption in favour of forgery.

Thus, when a long series of documents are produced, showing a reasonable origin of title, nearly a century ago, a regular deduction of that title, and a possession consistent with it, the evidence of intrinsic improbability must be very strong to counterbalance the weight of such evidence.

mouzahs formed a *Shikmee Talook* before the Decennial Settlement held of the *Zemindar* by a *Mocurrery* tenure at a fixed rent, and not liable to alteration. Second, that as the purchase was made in 1833, and the suit brought in 1853, the claim was barred by the *Ben.* Reg. of Limitations III. of 1793, sec. 14, which prescribes twelve years for the recovery of the estate.

The Respondents' case was, that the *mouzahs* formed part of the *Zemindary*, and were held *Khas* by the *Zemindar* at the time of a sale of the *Zemindary*, under *Ben.* Reg. XI. of 1822, to realize arrears of Government revenue, and that the purchaser, and those claiming under, become thereby entitled to the *mouzahs*.

Upon the hearing of the first appeal,

The Solicitor-General (Sir *R. Palmer*) and Mr. *Leith*, appeared for the Appellants; and

Mr. *Rolt*, Q.C., and Mr. *Field*, for the Respondents;

When their Lordships reserved judgment until the hearing of the second appeal. On the second case coming on.

The Attorney-General (Sir *R. Palmer*) and Mr. *Leith*, again appeared for the Appellants; and

Mr. *Rolt*, Q.C., and Mr. *W. H. Melvill*, for the Respondents.

Their Lordships' judgment having been reserved, was now delivered by

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The Right Hon. the Lord JUSTICE TURNER.

In the month of *December*, 1833, a *Zemindary*, called *Tuppah Cooreekhuy*, in the Collectorate of *Zillah Mymensingh*, was put up for sale by public auction to satisfy arrears of Government revenue under Regulation XI. of 1822.

It was purchased by or on behalf of *Bhobanny Acharjee Chowdry*, and it was not disputed that the purchaser acquired whatever rights in the *Zemindary* belonged to the *Zemindar* at the time of the Decennial, or Perpetual Settlement. He was entitled to the immediate possession of such lands as at the time of the sale were in possession of the *Zemindar*, and he had a right under the Revenue sale law to set aside by suit all sub-tenures created since the Decennial Settlement by the *Zemindar*, or any of his ancestors.

Within this *Zemindary* were certain *mouzahs*, which, or portions of which, are the subject of the two suits now in appeal. These suits relate to different parts of the same property, are between the same parties, depend on the same evidence, and are substantially one suit.

The *mouzahs* in question were alleged by persons now represented by the Appellants to form a *Shikmee Talook* created before the Decennial Settlement held of the *Zemindar* by *Mocurrery* tenure, *i.e.* at a fixed rent, not liable to alteration.

The purchaser, on the other hand, whose interests are now represented by the Respondents, insisted that these *mouzahs* were part of the *Zemindary*, and were held *khas* by the *Zemindar* at the time of the sale, and that the purchaser, therefore, became entitled to them. Possession of the *Zemindary* was ordered

to be delivered to the purchaser, and his agent was put into possession of the lands in question as part of the *Zemindary*. His possession, however, was disputed on the grounds already stated by the persons claiming as *Talookdars*, who insisted that they were in possession of the lands in that character at the time of the sale. After much litigation, the *Sudder* Court was of opinion, that the *Talookdars* had been in possession at the period in question, and ordered the possession to be restored to them, the purchaser being left to institute a regular suit to set aside such possession.

Under this order the persons claiming as *Talookdars* were put into possession of part of the lands in dispute in *December*, 1840, and of the rest early in 1841, as appears by certain *dakhulnamahs* in evidence in this case.

This decision left the right undetermined, and settled only the question of possession, and it became necessary for the purchaser of the *Zemindary*, if he meant to institute any suit for the recovery of the lands, to institute it within twelve years from this time. But about this time, that is, in the year 1840 or 1841, *Chowdry*, the purchaser, died, leaving a widow, and the widow and the mother of *Chowdry* became his representatives. The widow, as she alleges, under a Will made by her husband, had power to adopt, and adopted, a son, and neither the validity of the Will nor the fact of adoption is in controversy in this case. She instituted a suit in 1853 for the recovery of this property, which failed upon merely technical grounds, for want of a sufficient stamp on the proceedings, or for some such reason. In 1855, the first suit now under appeal was com-

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menced. As regards any bar arising from the Regulations of Limitations, this suit must be treated as if it had begun in 1853.

The Appellants, in their pleadings insist, that the period from which the Respondents' obligation to sue commenced is to be calculated from the time of the purchase in 1833, and they, therefore, insist on the Regulation for the limitation of actions in bar of the present claim; but they do not by these pleadings insist on such bar if the period is to be calculated from the time when the possession was taken from the purchaser in 1840 and 1841; and we are clearly of opinion, that this is the period from which the time must be computed. The death of the purchaser and the minority of the heir would clearly take the case in that view out of the Regulation of Limitations. The rights of the parties, therefore, must be decided on the merits.

The real question, which is one of some difficulty, is, whether the lands in question were constituted a *Talook* previously to the Decennial Settlement in 1790–91, by the then *Zemindar*, as alleged by the Appellants, or whether they were at that time held *khas* by the *Zemindar* as part of his *Zemindary*, as alleged by the Respondents.

The title set up by the Appellants is this: they allege that the lands in question were granted by *Ghous Khan*, the then *Zemindar*, by two *Sunnuds*, one dated in 1779, and the other dated in 1784, at a fixed rent to his sister, *Amina Bebee*, as *Talookdar*, in *mududmash*, or for her maintenance at a fixed rent.

If these documents be genuine, there seems to be no reasonable doubt about the Appellants' right.

The Judge in the *Zillah* Court was of opinion that they are genuine, and he, therefore, dismissed the Respondents' suit.

The *Sudder* Court, on appeal, was of a different opinion, and made a decree in favour of the Respondents.

The first of these suits was heard before us, on appeal, in *February*, 1863. It appeared that the second suit was coming on for hearing, and we were of opinion that it might be material to see some of the original documents, and also to consider other evidence not at that time before us, and we, therefore, directed that the decision on the first suit should be delayed till the second had been heard, and that the *Sunnuds* relied on by the Appellants should be sent over to this country.

Some additional evidence has been printed, and the papers purporting to be the original *Sunnuds* have been sent over, and the question now to be determined is whether, upon the whole, the Appellants have sufficiently established their case.

It is not disputed by the Appellants that these lands, being situate within the *Zemindary* purchased by the Respondents, are *primâ facie* to be considered as part of the *Zemindary*, and that it is for them, the Appellants, who insist on the separation of these lands from the general lands of the *Zemindary*, and on their settlement as *Shikmee Talook*, to establish their title.

To prove their case they produce papers purporting to be the two *Sunnuds* to which we have already referred.

Nothing has been pointed out to us in the appearance of these papers throwing any suspicion upon

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them, nor have we been able to discover anything which does so.

We have three deeds of sale, by *Amina Bebee*, and persons purchasing from her, professing to convey different portions of the lands as parts of a *Talook*. One of these deeds is dated in 1808, and another in 1821.

There are also produced two other *Sunnuds*, one purporting to be dated in 1813, by *Asheena Bebee*, the then *Zemindar*, to *Aymun Bebee* (a purchaser, from *Amina*), and another in 1815 by *Ibraham Khan*, the then *Zemindar*, to *Khosh Kuddun*, a purchaser of a part of this *Talook* from *Aymun Bebee*. These *Sunnuds* purport to recognize and confirm the title of the purchasers.

In proof that *Amina Bebee* had possession of these lands as a *Talook*, in conformity with the *Sunnuds* granted, we have *Chittas*, or measurement papers, signed by *Ameens* employed on behalf of the *Zemindar* to measure the lands of the *Zemindary* in the years 1787, 1788, 1789, 1790, 1791, and 1792. These *Chittas* describe the lands as the *Talook* of *Amina Bebee*.

We have further the detailed accounts of the agent in receipt of the rents of these lands in the year 1790, describing them as the *Talook* of *Amina Bebee*.

There are other measurement papers or *Chittas* affording the same evidence in the years 1807 and 1816.

There are then produced *dakhilas* or receipts for rent on behalf of the *Zemindar* for the *Talook* of *Amina Bebee* in the years 1780, 1805, 1817, 1820, and 1828.

Several other documents are in evidence showing, if they be genuine, the same fact, that at an early date and before the Decennial Settlement a *Shikmee Talook* had been constituted in favour of *Amina Bebee* at a *Mocurrery jumma*, and that the lands included in it were held by her or persons claiming under her up to the time or nearly up to the time of the sale of the *Zemindary* in 1833.

It was established by the Order of the Court restoring the Appellants to the lands in the year 1840, that they were in possession of them at the time of the sale, for the Order was made entirely upon that ground, and decided nothing as to the title.

Against this great body of evidence there is really nothing which can be called evidence on the part of the Respondents, but they allege and undertake to show that all the documents relied on by the Appellants are forgeries.

A long experience in Indian appeals has no doubt satisfied us that the presumption in favour of the genuineness of documents offered in evidence in that country is very weak; but still it must not be held that the presumption is in favour of forgery; and when a long series of documents is produced showing a reasonable origin of title nearly a century ago, a regular deduction of that title, and a possession consistent with it, confirmed by the all-important fact of such possession existing at the time of the commencement of the Respondents' title by purchase in 1833, the evidence of intrinsic improbability should be very strong indeed which is to counterbalance the weight of such testimony.

Still circumstances may be sufficiently strong for

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this purpose, and they have been held to be so in this case by the Judges of the *Sudder*.

We will remark upon the principal of these circumstances, but it is material to consider them with reference to the case set up by the Respondents.

The case set up by them is shortly and accurately stated in the judgment of the *Sudder* Court in these terms:—"The general allegation of the Plaintiff is, that *Ibraham Khan*, the proprietor of the *Zemindary*, up to the time of the revenue sale, fraudulently set up this *Talook* for his own benefit, for which purpose he has found it convenient to use the names of his relations and connections, *Aymun Bebee* (one of the alleged purchasers from *Amina*) being his wife, and *Amina Bebee*, the professed *Talookdar* of the *Sunnuds* of 1186 (1779) and 1191 (1784), being his aunt and the sister of the then *Zemindar*, *Ghous Khan*."

If this case be true, no doubt the *Sunnuds* purporting to create this *Talook* half a century before the sale, and the various documents long before the sale referring to it, must be forgeries. On the other hand, if these documents be genuine, then the Respondents' case must be untrue.

No direct evidence is offered against the genuineness of the *Sunnuds*, but it is said that they cannot have been made at the time when they bear date, for several reasons, of which these are the principal:—

First, it is said that the *Talook* is not mentioned in the Decennial or Quinquennial Settlement as such, and that the lands are included in the Decennial Settlement, as part of the *Zemindary* for which the *jumma* is assessed on the *Zemindar*.

We have not before us the particulars of these Settlements, but assuming the statements to be accurate, the fact does not seem to afford any strong inference against the existence of the *Talook*.

If it had been an independent *Talook* it would have been liable to direct assessment by the Government, and would have been the subject of assessment on the *Talookdar*, but being only a *Shikmee Talook*, paying rent to the *Zemindar*, the *Talookdars* were not required to mention it, nor was it necessary for the *Zemindar* to do so.

It is then said that if the *Sunnuds* and the various instruments by which conveyances of portions of the *Talook* are alleged to have been subsequently made had been really executed, those instruments, or at all events some of them, would have been registered, and that none of them have in fact been registered.

No Regulations have been pointed out to us by which the registration of these *Sunnuds* or of this *Talook* (created, if at all, before the Decennial Settlement) was made necessary; and though the observations of the Judges of the *Sudder*, "that the deeds want the authentication which registration would have afforded," and "that the *Talook* wants the corroboration which registration and its mention in the quinquennial papers would have afforded," be perfectly well founded and entitled to weight, it must be considered whether, without this evidence, the proof be not sufficient.

A circumstance more strongly relied on by the Respondents' Counsel was this, that these *Sunnuds* were never produced or mentioned by the Appellants on several occasions on which, it is said, if they had really been in existence at that time, they ought

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to have been produced, and certainly would have been produced.

First, it is said that a litigation went on from the time of the sale in 1833 up to the year 1840 with respect to the possession of these lands, and that in the course of that suit no allusion was made to these documents. But the answer given to this objection much diminishes its force, viz., that the question then before the Court was not one of title but of possession, and that it was only on the question of title, as to which the Court had no power in that suit to pronounce any decision, that the production of the original *Sunnuds* was of importance. Though these *Sunnuds* were not produced, the title under them was asserted, and the *Sunnud* of confirmation of 1813 from *Asheena Bebee* to *Aymun Bebee* seems to have been actually produced on the 2nd of *July*, 1839.

Another objection which was much pressed at our bar was this:—These *Sunnuds* describe the lands as *La-khiraj* and *Muddudmash*, whereas it is said that they were not alleged to be *La-khiraj* at the time of the Decennial Settlement, but were included in the lands subject to assessment, and that it was not till a much later period (not very long before the sale) that they were claimed to be *La-khiraj*, and these instruments must, therefore, have been fabricated after that claim had been set up.

Now, the force of this argument depends on the allegation that these lands were not claimed or pretended by the then *Zemindar* to be *La-khiraj* before the Settlement. But of this we find no sufficient evidence. It is well known that before that time, and especially about that time, a great number of

fictitious claims to exemption from assessment of lands as *La-khiraj* were set up by different proprietors, and although it was held in what is called the Alluvion suit that the lands were not in fact *La-khiraj*, and that the *Firman* of the Sultan purporting to make them so had been forged by *Ibrahim Khan*, yet that fact by no means shows that at the dates of these *Sunnads* the then *Zemindar* did not claim or pretend them to be so. Whether they were or not included in the assessment was a question depending on the description contained in the Decennial Settlement; and though the Government officer was satisfied after much inquiry that they were in fact covered by the assessment, such descriptions are generally vague and uncertain, and the difficulty of identifying lands is greatly increased in a long lapse of years when it appears that the lands adjoin the great river *Burhampooter*, and are subject to be submerged and have their boundaries changed by not unfrequent overflows or changes in the course of the stream.

The last objection which we think it necessary to notice, and to which we confess we are inclined to attribute the most weight, is that in 1836, Mr. *Glass*, the partner, as we understand it, with Mr. *Wise*, one of the present Appellants, insisted upon a title to a portion of these lands under a lease alleged to have been granted to him by *Ibrahim Khan*, the late *Zemindar*, whereas Mr. *Wise* now claims under a purchase subsequently made by him and *Glass* from *Aymun Beebee* in 1840; and insists that *Ibrahim Khan* was never in possession of the lands, and that they were not part of the *Zemindary*, except as being part of a dependent *Talook*.

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Undoubtedly these two titles are inconsistent, but it is not impossible that Mr. *Glass* might first procure a lease from *Ibrahim Khan*, supposing him to be the owner, and might afterwards, when the title of the *Talookdars* was insisted on, and seemed likely to succeed, make a purchase from them, in order that he might, under any circumstances, be secure in the enjoyment of his indigo plantations.

The probability of this being so is strengthened by the statement in the petition of *Glass* to the *Sudder* Court in 1838, in which he alleges "that he had for a long time been making indigo cultivation on the lands after taking *izara pottahs* of them from the proprietors, *i. e. Talookdars* and *Zemindars*."

We are very far from thinking that the various objections thus made to the title of the *Talookdars*, and so ably urged at our Bar, are without force. But against them we must set the evidence produced by the Appellants in confirmation of their title.

Now, any evidence which proves the existence of this *Talook* at a period antecedent to that at which the Respondents allege it to have been falsely set up by *Ibrahim Khan* tends more or less strongly to disprove their case. The Appellants' evidence upon that point seems to us very strong.

In the year 1819, there is a proceeding in the appeal Court of *Jehangur Nuggur*, in which the question was, whether certain lands belonged to this *Talook* or were part of the *khas* lands of the *Zemindar*.

In 1824, we have a petition from a person complaining that *Khosh Khuddum* had agreed to sell to him a portion of his share of the *Talook*, but had refused to perform his contract.

In 1833, we find an Order made in a suit which had been instituted in the year 1831 by *Aymun Beebee* against her husband, *Ibrahim Khan*, by which a part of the lands of this *Talook* was ordered to be sold to satisfy fees due to the Pleaders.

In 1843, we find it stated upon the result of an inquiry then directed by the Civil Court of *Mymensingh*, that when the *Talook* was about to be sold the Plaintiff's *Mooktar* deposited in the Treasury of the Collectorate the sum demanded.

These proceedings are very important, not only because they show that in 1833 a portion of this *Talook* was dealt with by the Court as the property of *Aymun Beebee*, but because it makes the supposed collusion between *Ibrahim Khan* and his wife, *Aymun Beebee*, which is essential to the Respondents' case, in the highest degree improbable.

That the *Sunnuds* in question have not been fabricated since the institution of these suits is clear from the proceedings in the suit with the Government as to the alluvion lands, which are of great importance.

It appears that some time before 1843 a tract of land which had been covered by the waters of the *Burhampooter* was left dry by some change in the course of the stream. This tract was within the limits of *Cooreekhuy*. If these were new derelict lands they would be subject to assessment to the Government; but it was insisted by the purchaser of the *Zemindary* and the *Talookdars* that they were lands which had originally been part of the *Zemindary*, had been submerged and again left dry; the *Zemindars* insisting that the lands were part of the *Zemindary*, and the *Talookdars* that they were a part of their *Talook*.

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After some proceedings in other Courts, which failed from some irregularity, a proceeding was instituted by the Government in the office of the Collector of *Mymensingh*, under Regulation XI. of 1819, for the purpose of determining the right of the Government. To this proceeding *Ibrahim Khan*, the present Respondent, *Bhoobun Moyee Debia*, and the Appellants, *Aymun Beebee* and *Khosh Kiddum*, were parties.

A great deal of evidence was gone into, and, amongst other documents, the *Sunnud* of 1779 now relied on, and some of the *chittas* and other papers produced by the Appellants in this suit, were put in by them, and the same case which they now set up was stated and insisted upon.

Whether the other *Sunnuds* now produced by the Appellants and all other papers were produced, we cannot clearly make out.

The *Sunnud* of 1779 was the subject of investigation at that time, and it appears by the Order made in the proceeding, and which dismissed the claim of the Government, that on the 5th of *April*, 1845, in order to attest, as it is called (meaning, no doubt, to test the genuineness of), the aforesaid *Sunnud* of 1779 (which seems to have been disputed), the Record Keeper was directed to produce any other papers which might tend to show the truth, and the witnesses named by the Defendants to prove their case were summoned.

It is then stated, that subsequent thereto the Record Keeper filed a *Kyfeut* stating that along with the papers of *Natoora Mehal* of *Tuppah Cooreekhuy* has been found a *Sunnud* sealed by *Mahomed Ghous*, and signed by him in the Persian

character, and that the seal and Persian character thereon tally with the Persian character and seal on the *Sunnud* filed in this case. It is then stated, that *Aymun Beebee* produced some *chittas* and a *terij* and *jummabundy*, and produced witnesses who deposed that *Ameena Beebee* had in the year (worm-eaten) acquired a *Sunnud* of the *Talook* of these *mouzahs* from *Mahomed Ghous, Zemindar*, had held possession since that year, and sold the same, and that in proportion to the said shares, *Khosh Kuddum, Aymun Beebee*, and Messrs. *Wise* and *Glass*, paid the rents of the *Talook* and held possession.

Now, it is said that the only question in that case was as to the right of the Commissioner to assess the lands as to which all the Defendants had a common interest, and that as co-Defendants the Respondents could not have disputed the evidence of the Appellants if they had had any interest to do so.

This may be true, although it is not easy to perceive why any inquiry into the truth of the *Talookdar's* title, or the genuineness of the documents produced in support of it, should have been made unless some contest on the subject had taken place between the *Zemindar* and the *Talookdars*. But, at least, at this time (in 1845), the Respondents having been turned out of possession in 1840, on the grounds which we have stated, had full notice of the title set up by the Appellants and of the evidence by which it was to be supported, and were bound to bring forward their claim in reasonable time. Yet these suits are not instituted for several years; and then, after every opportunity had been afforded of giving evidence to disprove these documents, no direct testimony against them is produced, and many

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of the witnesses who were examined in 1845 may very probably be dead or not forthcoming. We have already expressed our opinion that, for the reasons which we have stated, the Respondents' claim is not barred by the Regulation of Limitations, but much allowance must be made for the difficulties which they have imposed on the Appellants by so long delaying a suit in a country where documentary evidence is peculiarly liable to destruction or effacement, as appears by the papers in this case.

Upon the whole, we must humbly advise Her Majesty to reverse the decrees complained of, and to restore the decrees of the *Sudder Ameen*, and we think that all the costs of these suits, subsequent to the last-mentioned decrees, including the costs of these appeals, must be paid by the Respondents. We have thought it right to go at so much length into the circumstances of the case, because we are at all times extremely reluctant to reverse a unanimous judgment of the Court below on a question of fact, and because it is due to those learned Judges to show that we have not done so without having carefully considered and weighed the evidence.

BABOO GOPAL LALL THAKOOR - *Appellant,*

AND

TELUCK CHUNDER RAI and others *Respondents.**

On appeal from the Sudder Dewanny Adawlut at Calcutta.

2nd & 3rd March, 1865.

Suits by a *Zemindar* claiming as purchaser at a sale for arrears of Government revenue, to enhance the rents of certain *Talooks*, which formerly constituted one *Talook* held of the *Zemindary* at a fixed or *Mocurrery jumma*; dismissed by the *Sudder* Court, and such dismissal affirmed on appeal by the Judicial Committee, as the evidence established that each *Talookdar* had paid a fixed and invariable rent anterior to the Decennial Settlement, and consequently was not liable to an enhancement of rent.

The *onus* of proving that a *Talook* had been held at a fixed and invariable rent twelve years antecedent to the Perpetual Settlement lies on the Defendant.

THIS was an appeal from an order of the *Sudder Dewanny* Court at *Calcutta*, dated the 26th of *February*, 1859, made in five several special appeals to that Court from the decree of the *Zillah* Court of *Backergunge*, bearing date the 17th of *July*, 1858; and also from the last-mentioned decree, made in five appeals from the decree of the Principal *Sudder Ameen*.

The five separate suits were rendered necessary by

* Present: Members of the *Judicial Committee*—The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors:—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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the rules of procedure of the Courts in *India*. In each of these suits the Appellant was Plaintiff, and the several Respondents were respectively Defendants. The object of the suits was to obtain decrees for the enhancement of rent under *Ben.* Reg. V. of 1812, secs. 9 and 10, modified by Act, No. VIII. of 1848, in respect of five *Talooks* held by the Respondents respectively, of the Appellant, as *Zemindar* of *Tuppah Nazirpore*, in the Province of *Bengal*.

The facts appear from their Lordships' judgment.

As the Respondents did not appear, the appeals were heard *ex parte* on a single case, which was argued by

The Attorney-General (Sir *R. Palmer*) for the Appellant. Mr. *Leith*, who was with him, was not called on.

29th March, 1865.

After consideration, their Lordships' judgment was now pronounced by

The Right Hon. The Lord Justice KNIGHT BRUCE:

The question on this appeal, which has been heard *ex parte*, is upon the alleged right of the Appellant, as *Zemindar* of *Tuppah Nazirpore*, in the *Zillah* of *Backergunge*, and Province of *Bengal*, to reassess and increase the rents payable in respect of certain lands forming part of his *Zemindary*, which formerly constituted one, but were afterwards divided into five dependent *Talooks*.

The Appellant derives his title to the larger part of his *Zemindary* from a sale for arrears of Government revenue, which took place in 1819. Fourteen

sixteenths were thus purchased, partly by the Appellant's father and cousin jointly, and partly by one *Petumber Mozumdar*. All these shares have since, by descent or sub-purchase, become vested in the Appellant. The remaining two sixteenths are stated to have been acquired in 1830 by private purchase from a Mr. *John Panioty* and others in whom they were then vested.

To enforce his claim to enhance the rents of the five *Talooks* it was necessary for the Appellant to institute five separate suits. The amount involved in each of them was below, whilst the aggregate amount involved in the five exceeded; the sum for which an appeal to Her Majesty in Council lies as of right. The Order of the 22nd of *February*, 1860, giving special leave to appeal, provided that in case the parties in *India* should consent that the Order to be made by Her Majesty in one suit should govern the others, there should be an appeal in one suit only (*a*). This consent has, unfortunately, not been given; the proceedings in all the suits have been sent home and are now before their Lordships. The argument of the learned Counsel for the Appellant embraced all the suits, and this judgment must be taken to be given in each of them.

The five suits were commenced in *September*, 1855. Each was founded on the alleged right of the *Zemindar* claiming, in part at least, as purchaser at a sale for arrears of Government revenue, to enhance the rents of a *Talook* described as *Tashkhisi Zimma*, or a sub-tenure held upon payment of a rent variable according to the current rates of the district.

(*a*) Reported on this point, 7 Moore's Ind. App. Cases, 548.

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The title set up by the Respondents is to this effect. They allege that as early as 1704 (being the year 1111 of the *Bengal* era), one *Mookondo Ram Chuckerbutty* took, in thename of his son, *Ram Chuckerbutty*, an *Amildari Pottah* of the lands in question in the five suits, from *Syud Shumsuddeen Mahomed*, the then *Zemindar*, and held them as one *Talook*; that, on his death, his three sons, the said *Ram Chuckerbutty*, *Gungadhur Shedhanto*, and *Gopeenath Chuckerbutty*, held the *Talook* in thirds, making a separation by guess of part of the land, but holding the other part jointly; and that in 1755 A.D. (or 1162 B.E.) they made a settlement, witnessed by the seal of *Syud Imamoodeen Mahomed*, the descendant of *Syud Shumsuddeen Mahomed*, whereby the rent of the waste lands being postponed for future arrangement, they undertook to pay for the remaining and productive land a joint *jumma* of Rs. 1,901. They further allege, that afterwards a complete separation between the brothers took place; that *Gungadhur* took his share of the lands held jointly, as well as those cultivated by him separately, and formed thereout a separate *Talook* called *Sheeb-Kant* (a name compounded of the first syllables of the names of his two sons); that *Gopeenath Chuckerbutty* made in the same way a separate *Talook* out of his share, which he named *Lukhee-Kant* after one of his sons; that the remaining share continued as a third *Talook* in the possession of *Ram Chuckerbutty*, or of his two sons, *Beeshtodeb* and *Gobind Prosad*; and that this division was sanctioned by the *Zemindar*, and the consequent mutation of names effected, on the 26th of *Bysack*, 1164 (A.D. 1757), by a writing, under the seal of *Syud Imamoodeen Mahomed*, which provided that the *jumma*

or rent should be assessed according to the quantity of land held by each person as ascertained by subsequent measurement. They state, however, that before this measurement took place *Ram Chuckerbutty's* share was sub-divided between his two sons, *Beeshtodeb* and *Gobind Prosad*, and a further mutation of names effected in 1762, one of these sub-divisions becoming *Talook Ram-Lukhun*, the other *Beeshtodeb*. They further allege that after this, the contemplated measurement and survey took place; that the *Talook* of *Sheeb-Kant Chuckerbutty* was then assessed at a fixed *Mocurrery jumma* of Rs. 691. 9a. 2g.; that the *Talook Lukee-Kant Chuckerbutty* was assessed at a like *jumma* of Rs. 643. 15a. 13g.; that *Talook Ram-Lukhun Chuckerbutty* was in like manner assessed at Rs. 335. 6a. 9g.; and that of *Beeshtodeb*, existing under the name of *Ram Chuckerbutty*, at Rs. 337. 6g.; and that accordingly on the 14th *Joistee*, 1174 (being some time in the year 1767), separate *bundobusts*, or settlement papers, under the seal and signature of the *Zemindar*, *Syud Imamoodeen Mahomed*, were granted to the holders of each *Talook*, and contained these words: "The above amount of *jumma* being paid in current coin year by year, no increase shall be made to it, nor shall you give any."

Thus far the title of the Defendants in each of the five suits is common to all. The subject of the first suit is the *Talook Sheeb-Kant Chuckerbutty;* that of the second, *Ram-Lukhun Chuckerbutty;* that of the third, *Lukhee-Kant Chuckerbutty;* that of the fourth, *Radha-Madub Chuckerbutty;* and that of the fifth, *Ramchunder Chuckerbutty;* the two last-named *Talooks* having, after the death of *Beeshtodeb*, been

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formed out of this *Talook* on a partition and division between his two sons, *Radha Khristo* and *Radha Madub*, in or some time before A.D. 1807. The Defendants in the several suits derive their title from the *Talookdars* with whom the settlements of 1767 were made, some by descent, others by purchase; but it is not necessary for the determination of the present appeal to state these devolutions of title in detail.

From what has been said it is obvious that the principal question in each suit was, whether the *Talook* that was the subject of it had been held from a period considerably anterior to the Decennial Settlement at a fixed or *Mocurrery jumma*, or was held on a rent variable, and, therefore, subject to enhancement.

The other material issues in each suit were,—

First, whether the claim of the Plaintiff was barred by the Regulation of Limitations. And, secondly, whether the notice required by law as a preliminary to a suit for enhancement of rent had been duly served.

The five suits were heard together by the Principal *Sudder Ameen* of *Zillah Backergunge* on the 20th of *January*, 1858. His decision was in favour of the Appellant on all points. The Defendants in each suit appealed to the *Zillah* Judge (Mr. *Kemp*), who, on the 17th of *July*, 1858, reversed the decision of the Principal *Sudder Ameen*, and decided in favour of the Defendants. His judgment proceeded on the ground that the Defendants had established by evidence that each *Talook* had paid a fixed and invariable rent for more than twelve years anterior to the Perpetual Settlement, and was consequently not liable to further assessment.

The Appellant then carried the five causes to the *Sudder Dewanny Adawlut* on special appeal, upon certain grounds. These seemed to have resolved themselves into the following objections:—First, that the Judge, having determined that the suits were barred by the Regulation of Limitations, was in error in afterwards going into the merits of them; and secondly, that he was in error in holding that a suit for enhancement of rent must be brought within twelve years from the date at which the Plaintiff's title accrued.

The judgment of the *Sudder* Court dismissed the special appeals on the ground that the Judge had in fact decided the suits, not on the question of limitation, but upon their merits, and that his decision, being one of questions of fact, could not be reviewed by that Court on special appeal.

Their Lordships, in dealing with the present appeal, will assume that the Appellant's claim is not barred by lapse of time, and that he has duly served the notices required by law. These points appear to have been decided below in his favour, and their Lordships see no ground to doubt the correctness of that decision. They propose, then, to confine their attention to the question whether it was sufficiently proved in the Courts below that the present *Talooks* had been held at a fixed and invariable rent for more than twelve years antecedent to the Perpetual Settlement, it being admitted that, as the law stood in 1858, the burthen of proving this lay on the Defendants.

The principal documents on which the Defendants rely in support of their title are the settlement of the 21st of *Srabun*, 1162; the *Kharijee Likhons*, or mutation papers, of the 16th and 26th of *Bysack*, 1164; the similar document of the 13th *Jòistee*,

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1169; the four *Bundobusts*, or settlements of the 11th and 14th *Joistee*, 1174; the *Furud* of 1198; the petition of 1810; the *Dakhilas*, or receipts for rent. The mutation paper of *Choitro*, 1214, bears only on the partition in 1807 between the sons of *Beeshtodeb*, and the titles of the Defendants in the fourth and fifth suits.

What then is the effect of these documents if taken as genuine? The first establishes the existence of the dependent *Talook*, *Ram Chuckerbutty*, in the year 1755; the two next prove the division of that *Talook* into three in the year 1757, and the further subdivision of one of these into two in 1762. But all these fail to show that these *Talooks* were held at a fixed and invariable rent. The first is at least consistent with the hypothesis that the rent of the parent *Talook* might vary with the amount of land brought under cultivation; the others import that the rent of each of the four derivative *Talooks* was not to be settled until after survey and measurement. On the other hand, the four *Bundobusts* or settlement papers of 1174, if genuine, prove that in 1767 A.D., the rent of each of the four *Talooks* became fixed and invariable; and the *Dakhilas* support the contention of the Defendants that they and their predecessors had ever since continued to hold their lands at these rents. The *Furud* shows that in 1792, and the petition shows that in 1810, the *Zemindar* for the time being recognized the *Bundobusts* of 1174, and admitted the title of the Defendants. Unless, therefore, this evidence can be successfully impeached, it seems fully to warrant the conclusion of the *Zillah* Judge that the Defendants had relieved themselves of the heavy burthen which the law cast upon them, and

established the immunity of their lands from further assessment.

Before, however, considering the objections taken to the genuineness or credibility of the Defendant's evidence, their Lordships desire to notice the objection taken by the Attorney-General, to the effect that these documents, if genuine, contain no "words of inheritance" (to use the English phrase), *i.e.* no expressions importing the hereditary character of the alleged tenures. Their Lordships conceive that this objection, which does not appear to have been taken in the Courts below, is not open to the Appellant in these suits. He is not suing for the recovery of the lands, or to disturb the possession of the Defendants, in which case he might have been successfully met, and no doubt would have been met, by a plea of the Regulation of Limitations. His suits are for the enhancement of rent. The pleadings consequently admit the existence of the tenures, and the lawful occupation of the Defendants. The only question between the parties is, whether the *Talooks* are *Tashkhis* or *Mocurrery; i.e.* whether they are held at a variable or at a fixed and invariable rent. Moreover, if the objection were open to the Appellant, it could hardly prevail against the evidence which the record affords, that for upwards of a century these *Talooks* have been treated as hereditary, and as such have both descended from father to son, and been the subject of purchase. It may further be observed that in the mutation papers of 1807, the *Talook* of *Beeshtodeb* is expressly termed "hereditary."

What then are the objections to the proof offered by the Defendants? The first, and not the least formidable, is that based upon the fact, established, if

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not admitted, that *Syud Imamoodeen Mahomed* died in 1192 B.E. or 1785 A.D. This applies directly only to the *Furud*, and to some of the *Dakhilas*. It affects the more material documents (the *Bundobusts* of 1174) in so far only as it tends to deprive them of the important corroboration which they derive from the *Furud*, if genuine, and to throw suspicion generally on the Defendants' case.

It is clear that the *Furud* bearing the seal and "*Sri*" signature of *Syud Imamoodeen Mahomed* has not been concocted recently, or for the purposes of these suits.

That it existed in 1806, and was filed with other documents in the suit before Mr. *Winden*, is shown beyond reasonable doubt. It is very unlikely that it should have been fabricated for production in that suit, which was one between the *Talookdars* and their sub-tenants. On the other hand, it appears that the Perpetual Settlement of this *Zemindary*, the most important transaction in its history, was concluded several years after *Syud Imamoodeen Mahomed's* death, in his name, though possibly without the use of his seal. This was six years later than the date of the *Furud*. There is abundant evidence of the appearance of his seal and of his "*Sri*" signature upon other *Zemindary* documents purporting to bear a date later than that of his death. If such documents have been rejected in some cases, they have been admitted and acted upon in others. Weighing the evidence on both sides, their Lordships are not disposed to dissent from the conclusion of Mr. *Kemp*, that the date of *Syud Imamoodeen Mahomed's* death is not a fatal objection to the genuineness of the *Furud*, and the *Dakhilas* im-

peached on the same ground; but that all may, nevertheless, be taken to have come from the *Sharista* or office of the *Zemindar*.

It is then objected, as a suspicious circumstance, that though the *Furud* was produced in 1806, the *Bundobusts* or settlements of 1174, to which it refers, were not then produced. The answer to this is, that their production was not necessary for the purposes of that suit. Documents are not produced in the Courts of *India* without some risk; and of all men the dependent *Talookdar* has the greatest reason to be careful of his title-deeds, since, whatever may have been the recognition of his title by his existing *Zemindar*, he may at some future time have to establish that title by the strictest proof against one coming in by purchase at a sale for arrears of revenue.

Another objection taken to the genuineness of the *Bundobusts* of 1174 is that no mention of them is made in the copy of the Quinquennial paper for 1227 B.E., corresponding with A.D. 1820. That there is some foundation for this objection their Lordships do not deny; as that document is not very well authenticated. Little, if any, weight seems to have been attached to it even by the Principal *Sudder Ameen*, whose judgment was in favour of the Appellant. The inference founded on the omission to mention certain papers is not conclusive against their existence; and, indeed, there is in the last column of this Quinquennial return a general reference to papers other than those mentioned in the preceding columns. Whatever may be the force of this inference, it seems too slight to outweigh the corroborative proof of the existence of the *Bundobusts* long before 1820, which

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is afforded by the *Furud*, and by the *Zemindar's* petition.

The evidence that has been given on either side, to prove or to disprove, that the enjoyment of the *Talook* has been consistent with the hypothesis that the tenures were *Mocurrery*, remains to be considered. The earlier *Dakhilas* produced (the objection to such of them as are subsequent in date to the death of *Syud Imamoodeen Mahomed* having already been disposed of) prove that for upwards of twelve years prior and up to the Perpetual Settlement the *Talooks* were held and enjoyed at the fixed rents specified in the several *Bundobusts*. So far, then, the Defendants have given the proof which the Regulations require from them. But then it is objected that *jumma wasil Bakee* papers produced by the Appellant show that at a subsequent period the rents were variable. These papers are for various years between the year 1203 and 1216, and purport to show the collections in these years made either by the Receiver appointed by the Court of Wards during the minority of the *Zemindar*, or by a lessee named *Mozoomdar*. They do not mention the *Talook Sheeb-Kant Chuckerbutty*, which is the subject of the first suit; and the title of the Defendants in that suit is, therefore, unaffected by them. It is perhaps for that reason that so little notice of them is taken by Mr. *Kemp* in his judgment. On the other hand, if genuine, they do show that during these years rents higher than those which the Defendants contend to be fixed or invariable were demanded and realized in respect of the other *Talooks*, and that those rents were to some degree variable in amount. But all these accounts appear to be of a date earlier than 1810. In that year, it appears from

the *Zemindar's* petition, the *Talookdars* remonstrated against certain exactions to which they had been subjected, asserted the title which their successors now assert, and obtained a recognition of it from the then *Zemindar*. There is no evidence that since that time the rent paid in respect of any of the *Talooks* has varied, and it is shown that for fourteen years after he had full notice in the proceeding before Mr. *Knott*, that the Defendants relied on the alleged settlement of 1174, the Appellant continued to receive the rents so fixed without seeking to enhance them. The conclusion, therefore, to which their Lordships would come upon the evidence is, that between 1768 and the date of the Perpetual Settlement the enjoyment of these *Talooks* was consistent with the *Bundobusts* of 1174, that it has been equally so since 1810, and that if higher and varying rents were exacted in respect of any of the *Talooks* during the period covered by the *jumma wasil Bakee* papers, such exaction was wrongful, and was remedied in 1810, when the recognition of the *Zemindar* remitted the *Talookdars* to their original rights. This argument assumes the genuineness of the *jumma wasil Bakee* papers, as to which there may be some doubt. They are certainly inconsistent with the *Dakhilas* for those years produced by the Defendants.

On the whole, their Lordships, though labouring under the disadvantage of having heard only the able, but at the same time candid, argument for the Appellant, have failed to find any sufficient grounds for disturbing the judgment of the Court below upon a pure issue of fact. The order, therefore, which they must humbly recommend Her Majesty to make is that this appeal be dismissed.

MUSSUMAT JARIUT-OOL-BUTOOL - *Appellant,*

AND

MUSSUMAT HOSEINEE BEGUM - *Respondent.**

On appeal from the Sudder Dewanny Adawlut, North-West Provinces.

19th June, 1865.

Within six months after decree and prior to the admission of an appeal therefrom to *England*, the *Sudder Dewanny* Court upon an *ex parte* application, without notice, issued an execution Order putting the decree-holder in possession. This was done without calling for security as provided by sec. 4, *Ben.* Reg. XVI. of 1797. The Appellant, on the admission of the appeal, applied to the *Sudder* Court for security from the party in possession pending the appeal, but that Court held that as the decree-holder was in possession under an execution Order, which could not be appealed from, they had no power to interfere. On petition the Judicial Committee, in the circumstances, and upon affidavit of waste, made an Order, declaring that it was competent to the *Sudder* Court to require security to be given for protection of the property pending the appeal, notwithstanding execution of the decree had issued, and gave permission to the Appellant to apply to the *Sudder* Court with an intimation of that opinion.

THIS was an application by the Appellant for an order that the Respondent, who was in possession as a decree-holder, under an execution order of the *Sudder* Court, to give security for the protection of the property in suit pending the appeal to *England*.

The petition alleged, that the Respondent instituted a suit against the Appellant, claiming possession of an estate called *Purhut*, and certain villages; that a decree was made in favour of the Respondent; the

* Present:—Members of the *Judicial Committee*—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John T. Coleridge.

Assessors:—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

Petitioner appealed to the *Sudder Dewanny Adawlut* for the *North-Western* Provinces, and that Court affirmed the decree of the Civil Court, and dismissed the appeal; but allowed an appeal to the Privy Council, the transcript record of which appeal arrived in *England* on the 1st of *February*, 1865.

The petition set out the circumstances which gave rise to this application, from which it appeared that, prior to the admission of the appeal, the Respondent applied for execution of the decree of the Civil Court, as affirmed by the *Sudder Dewanny Adawlut*, and the same was ordered to be carried into execution, whereupon the Respondent was put in possession of the estate. This order was made and carried into effect without taking any security from the Respondent. The mode for proceeding, and the course to be pursued by the *Sudder* Court in case of an appeal, is prescribed by *Ben.* Reg. XVI. of 1797, which, by sec. 4 provides that — "In cases of appeal to His Majesty in Council, the Court of *Sudder Dewanny Adawlut* may either order the judgment passed by them to be carried into execution, taking sufficient security from the party in whose favour the same may be passed, for the due performance of such order or decree as His Majesty, his heirs or successors, shall think fit to make on the appeal, or to suspend the execution of their judgment during the appeal, taking the like security, in the latter case, from the party left in possession of the property adjudged against him." Notwithstanding the provisions of the above-mentioned Regulation, the *Sudder Dewanny Adawlut* did not take security from the Respondent upon the admission of the appeal of the Petitioner; and

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although the Petitioner caused several applications to be made to that Court, with a view to security being taken from the Respondent, such applications were rejected. The last of those applications was rejected by the Court on the 20th of *November*, 1863, when the opinion of the Court was recorded in the following terms:—"The first point to be considered is, whether we can take this application into consideration. On this point we are of opinion that, as this application is preferred under sec. 4, *Ben.* Reg. XVI. of 1797, it is unnecessary to refer to the provisions of Act, No. VIII. of 1859, relative to reviews of judgments. The next point is, whether this application can be granted. On this point we are of opinion that, as execution of decree has been completed, the Court are not in a position to call upon the decree-holder to furnish security. Had the application been made in due time before execution of the decree had taken place, there would have been no difficulty in complying with it. The law above quoted does not contemplate the cases of decrees already executed. Sec. 92, Act No. VIII. of 1859, is, in our opinion, inapplicable. We accordingly reject the application."

The petition then alleged, that the Petitioner, finding it impossible to obtain redress in *India* in the matter of security from the Respondent, had been compelled to wait until an application could be made on her behalf to Her Majesty in Council, and that this application was made at the earliest date at which it was possible to have made the same; and it was insisted, first, that it was the duty of the *Sudder Dewanny Adawlut*, upon or after the admission of the Petitioner's appeal, to have taken security from the Respondent for the property which

had been transferred to her, by reason that the *Ben.* Reg. XVI. of 1797, so far as respects the taking of security, was imperative, and gave the Court no option or discretion in the matter. Secondly, that the opinion of the *Sudder Dewanny Adawlut*, to the effect that the *Ben.* Reg. XVI. of 1797, did not contemplate the cases of decrees already executed, was erroneous, and that, on the contrary, the *Ben.* Reg. V. of 1798, referring *inter alia* to cases of appeal under *Ben.* Reg. XVI. of 1797, and providing a mode of enforcing security by attachment of the property, expressly includes cases of executed judgments, and that thus a strong presumption was afforded that *Ben.* Reg. XVI. of 1797 (in the absence of any expressed exception) was intended also to include such cases; and the Petitioner submitted that, under the provisions of the *Ben.* Reg. XVI. of 1797, she, having lodged her appeal within the time fixed by that Regulation, was plainly entitled to the benefit of the security prescribed by the same. That as no appearance had yet been entered on behalf of the Respondent to the appeal, and as considerable time must necessarily elapse before judgment can be obtained upon the appeal, the Petitioner had good reason to fear that, unless security be taken from the Respondent, the property which has been transferred to the Respondent in execution of the decree appealed from would be almost entirely wasted pending the appeal, and the Petitioner unable to reap the benefit of the decision upon appeal, if the same should be in her favour; and the petition prayed that the Respondent might be ordered within six weeks from the service of an Order upon her to that effect, to give full and sufficient security to the *Sudder Dewanny*

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Adawlut for the *North-Western* Provinces for the due performance of such decree as Her Majesty in Council shall think fit to make on the appeal, and that the amount of such security might be calculated and determined by the *Sudder Dewanny Adawlut*, and that in such calculations the mesne profits which have accrued from the property since the transfer thereof to the Respondent, as well as the value of the property transferred, may be taken into account; or that in default of the Respondent giving the required security within the before-mentioned period, then that so much of the property transferred to the Respondent as is now in her possession or power may be placed under attachment pending the appeal; that the requisite directions may be given for the purposes aforesaid, or for other relief.

Affidavits were filed confirming the facts contained in the petition, and of the waste committed by the party in possession.

Mr. *W. H. Melvill*, and Mr. *Almaric Rumsey*, for the Petitioner.

First: We are entitled to an Order directing the *Sudder* Court to obtain security from the Respondent pending the appeal. The affidavits show that the estate is being wasted. *In re Rajah Vassareddy Lutchmeputty Naidoo* (*a*) is a case which illustrates our position that the estate may be entirely lost by the Court below neglecting to take security. The *Sudder Dewanny* Court should not have allowed the Order for the execution to the decree-holder without taking security, *Ben.* Reg. XVI. of 1797, sec. 2, which embodies Statute, 21st Geo. III. c. 70,

(*a*) 5 Moore's Ind. App. Cases, 300.

sec. 21, *Ben.* Reg. XIII. of 1808, sec. 11 cl. 3; Circular Orders of the *North-West* Provinces, vol. I. p. 513. [Sir *John Coleridge:* Why was not an application made to stay execution?] We had no notice that the Order would be applied for. When the appeal was admitted six months had not expired, therefore we were not too late in applying for security. *Ben.* Reg. V. of 1798, secs. 5 & 6, provides for additional security after appeal. [Sir *James Colvile:* Does not the Act, No. VIII. of 1859, provide that there shall be no appeal from an Order directing execution?] It may be that such Order was not appealable, but, notwithstanding, this Court can admit an appeal. *The East India Company* v. *Syed Ally* (*a*). Secondly, if there is any doubt as to the power in this Tribunal to grant the prayer of the petition, we ask for leave to apply to the *Sudder* Court for security, with an intimation of your Lordships' opinion on the question of law, as *In re Muir* (*b*). If an Order cannot be made in either of these forms, we are in the alternative prepared with a petition for special leave to appeal from the execution Order, and to have the question argued *nunc pro tunc*, as was done in *Exp. Minchin* (*c*).

The Lord Justice TURNER:

Their Lordships have felt some difficulty in dealing with this case, which in the circumstances is new. But, on examining the Regulations and considering the nature of the case, they are of opinion, that an

(*a*) 7 Moore's Ind. App. Cases, 555.
(*b*) 3 Moore's P. C. Cases, 150.
(*c*) 4 Moore's Ind. App. Cases, 220.

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Order may be made upon this application. At the same time, they think the proper Order to be made should be one which should leave it, as far as possible, in the discretion of the *Sudder Dewanny Adawlut* as to what proceedings, or what steps, should be taken; and their Lordships propose, therefore, to make the Order in this form:—Their Lordships, being of opinion that it is expedient that sufficient security should be taken from the Respondent for the due performance of such Order and decree as Her Majesty may make on this appeal, and that it is competent to the *Sudder Dewanny Adawlut* to require such security to be given, or otherwise to provide for the protection and security of the property in question pending this appeal, notwithstanding that execution had issued before this appeal was allowed; and that the Appellant be at liberty to apply to the *Sudder Dewanny Adawlut* for such security to be given, or such provision to be made, as she may admit.

By the Order in Council made on the petition it was ordered, that the Appellant be at liberty to apply to the *Sudder Dewanny Adawlut* for the *North-Western* Provinces for such security to be given or such provision made for the protection and security of the property in question pending this appeal as she may be advised. Whereof the Judges of the *Sudder Dewanny Adawlut* for the *North-Western* Provinces of *Bengal* for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

SHAMA PURSHAD ROY CHOWDERY, AND OTHERS - - - } *Appellants,*

AND

HURRO PURSHAD ROY CHOWDERY, AND ANOTHER - - } *Respondents.**

On appeal from the Sudder Dewanny Adawlut of Bengal.

3rd March, 1865.

THE Appellants were the sons and heirs of *Doorga Purshad Roy Chowdery*, who had in his life-

* Present:—Members of the *Judicial Committee*,—The Right Hon Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors:—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

Section 16 of *Ben.* Reg. III. of 1793, declares, "that the *Zillah* and City Courts are prohibited from entertaining any cause which, from the production of a former decree or the records of the Court, shall appear to have been heard and determined by any former Judge, or any Superintendent of a Court having competent jurisdiction." Held to apply only to a case in which the question to be determined in the suit was the same as had been already heard and decided, and not to a case where new circumstances had intervened and altered the nature and character of the question to be determined.

Money realized under a decree, or judgment, cannot be recovered back in a new suit or action, while such decree or judgment under which it was recovered remains in force, as the original decree, or judgment, must be taken to be subsisting and valid until it has been reversed or superseded by ulterior proceeding.

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time instituted a suit in the *Zillah* Court of the Twenty-Four *Pergunnahs* against the original Respondent, *Tara Purshad Roy Chowdery*, who died pending the appeal, and was afterwards represented by the present Respondents. The object of that suit was to obtain a refund and recovery from the former Respondent of the sum of Rs. 23,294. 9. 16½. on account of principal and interest and costs; such principal money having been realized by him from *Doorga Purshad Roy Chowdery*, for interest which accrued on another principal sum, under a decree, dated the 12th of *August*, 1844, made in a suit instituted in the same *Zillah* Court. It appeared that this latter decree was contrary both in spirit and in terms to an Order of Her Majesty in Council of the 18th of *July*, 1849, made subsequently in an appeal (*a*), in another suit between the same parties involving substantially the same rights; raising the same questions of law and fact, and dealing with the same principal sum on which the interest claimed and recovered by *Tara Purshad Roy Chowdery* in the above-mentioned suit had accrued.

The principal questions raised by the present appeal were, first, whether as the sum sought to be recovered by *Doorga Purshad Roy Chowdery* was obtained by the original Respondent under a decree of the *Zillah* Court, such decree could be pleaded, under *Ben.* Reg. III. of 1793, sec. 16, as a bar to the suit, notwithstanding the before-mentioned Order in Council; and secondly, whether, independently of that section of the Regulation, the money having been paid under a decree of a Court of competent jurisdiction, he was precluded from recovering in a new suit, so

(*a*) See Doorga Pershad Roy Chowdry *v.* Tarra Persad Roy Chowdry, 4 Moore's Ind. App. Cases, 452.

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long as the decree under which it was recovered remained in force.

The material facts of the case are fully stated in the judgment.

At the hearing of the appeal,

Mr. *Leith* appeared for the Appellants, and
Mr. *W. H. Melvill* for the Respondents.

The case of *Doorga Pershad Roy Chowdry* v. *Tarra Persad Roy Chowdry* (*a*), was referred to in the argument of the Appellants; and *Ben.* Reg. III. sec. 16, of 1793, upon the question of the suit being barred by the previous decree, was referred to and insisted on by the Respondents.

29th March, 1865.

Judgment was delivered by

The Right Hon. the Lord Justice TURNER.

The facts of this case, so far as it is necessary to refer to them, lie in a narrow compass.

In the year 1821, *Doorga Purshad*, claiming to be entitled to the estate of his uncle, instituted a suit against *Shama Purshad Nundy*, a debtor to the uncle's estate, for recovery of the sum of Rs. 23,024, principal and interest due upon a Bond. Pending this suit and in the year 1827, *Tara Purshad Roy Chowdery*, the original Respondent, sued *Doorga Purshad* for recovery of one-half of the estate of the uncle, to which he (*Tara Purshad*) claimed to be entitled.

In the year 1829, there was a compromise of the suit instituted by *Tara Purshad* against *Doorga Purshad*, under which compromise *Tara Purshad* became entitled to a six-*anna* share of the debt due from *Shama Purshad Nundy*. Subsequently to this

(*a*) 4 Moore's Ind. App. Cases, 152.

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compromise, and on the 27th of *July*, 1829, *Doorga Purshad* obtained a decree in the Provincial Court against *Shama Purshad Nundy* for the amount of the principal and interest due upon the Bond. From this decree *Shama Purshad Nundy* appealed to the *Sudder* Court, and pending this appeal, and in the year 1831, there was a compromise of this suit also, which was effected by deeds, dated the 16th of *May*, 1831. The terms of this compromise were, that *Shama Purshad* should pay Rs. 24,217. 12. 17. at the end of three years, without interest, and that, in default of payment, *Doorga Purshad* should be at liberty to proceed and realize the amount. This compromise was, it appears, made without the privity of *Tara Purshad*, and the payment stipulated to be made by *Shama Purshad Nundy* at the end of the three years was not made by him.

In this state of circumstances, *Tara Purshad*, in the month of *March*, 1835, instituted another suit against *Doorga Purshad*, seeking to recover from him his (*Tara Purshad's*) six-*anna* share of *Shama Purshad Nundy's* Bond debt, and of the interest upon it up to the time of the commencement of the proceedings against *Shama Purshad Nundy* in the year 1821; and by the plaint in this suit, *Tara Purshad* reserved to himself the right to bring another suit for his share of the interest on the Bond debt from the last-mentioned date up to the date of the decree of the 27th of *July*, 1829, which *Doorga Purshad* had obtained as above mentioned.

This suit was carried through the Courts in *India* up to the *Sudder Dewanny Adawlut*, and ultimately, by a decree of that Court, dated the 15th of *April*, 1841, *Doorga Purshad* was decreed to pay to *Tara*

Purshad the entire amount of principal and interest for which his suit was brought. From this decree of the *Sudder* Court, *Doorga Purshad* appealed to Her Majesty in Council, and upon this appeal being heard before the Judicial Committee in *July*, 1849 (*a*), the Committee reported to Her Majesty, that the decree of the *Sudder* Court ought to be reversed, and that it ought to be declared that *Doorga Purshad* was liable to *Tara Purshad* for a six-*anna* share of what he, *Doorga Purshad*, had received, or might thereafter receive, and of what, if anything, he might at any time after the 16th of *May*, 1834 (being the expiration of the time limited by the deeds of compromise of the 16th of *May*, 1831), without his wilful default, have recovered or received from *Shama Purshad Nundy*, or in respect of the sum of Rs. 24,217. 12. 17., and the interest thereon, payable by *Shama Purshad Nundy* under the decree of the 27th of *July*, 1829, and the compromise of the 16th of *May*, 1831, and that the case ought to be referred back to the *Sudder Dewanny Adawlut*, to ascertain, carry out, and enforce the rights and liabilities of the parties as above declared, and that *Tara Purshad* should be at liberty to apply in the suit of *Doorga Purshad* against *Shama Purshad Nundy* for leave to enforce the decree in that suit, as he might be advised, for the recovery of his six-*anna* share of the Rs. 24,217. 12. 17., and interest, in so far as the same had not been already recovered.

By an Order of Her Majesty in Council, bearing date the 18th of *July*, 1849, this report was approved, and it was ordered that the decree of the *Sudder* Court of the 15th of *April*, 1841, should be, and the

(*a*) 4 Moore's Ind. App Cases, 464

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same was thereby reversed, and that it be declared and done as in the report more fully set forth and recommended, and that the same be duly and punctually obeyed, complied with, and carried into execution.

In the meantime, pending this appeal to Her Majesty in Council, and on the 3rd of *December*, 1842, *Tara Purshad* instituted a further suit against *Doorga Purshad* to recover the sum of Rs. 4,593. 12. 9., the interest upon his six-*anna* share of the sum secured by the Bond, from the year 1821, when the proceedings against *Shama Purshad Nundy* were commenced, up to the 27th of *July*, 1829, when the decree against him was made, being the interest for which by the plaint in his original suit he had reserved to himself the right to sue. This suit was heard before the Principal *Sudder Ameen* on the 11th of *August*, 1843, and by his decree of that date he dismissed the suit; but, upon an appeal by *Tara Purshad* to the Judge of the *Zillah* Court, the decision of the *Sudder Ameen* was reversed, and *Doorga Purshad* was ordered to pay to the Respondent the Rs. 4,593. 12. 9., with interest at 12 per cent. per annum, from the time of the commencement of the suit, with the costs in both Courts; and upon a special appeal by *Doorga Purshad* to the *Sudder Dewanny Adawlut*, that Court dismissed the appeal with costs. In consequence of these decrees *Doorga Purshad* was compelled to pay to *Tara Purshad* the sum of Rs. 11,127. 15. 3., which he accordingly paid as follows:—Rs. 8,200. 7. 3. on the 28th of *April*, 1848, and Rs. 2,927. 8. on the 4th of *August*, 1857.

Several attempts appear to have been made by *Doorga Purshad* after Her Majesty's Order in Council arrived in *India* to obtain a review of the

decrees made against him in the last-mentioned suit, and to have those decrees considered in connection with Her Majesty's Order in Council, but he failed in these attempts, and thereupon, on the 17th of *August*, 1857, he instituted against *Tara Purshad* the suit out of which the appeal before us has arisen. By his plaint in this suit he has sought to recover the sum of Rs. 23,294. 9. 16½., being the amount of the sums paid by him to *Tara Purshad*, and of the sums which he has paid for his own costs of the proceedings taken against him, with interest on such sums respectively from the respective times of the payment thereof at 12 per cent. per annum. *Tara Purshad*, by his answer to the plaint, has insisted that the decision of the Judge of the *Zillah* Court in his favour in the further suit brought by him, having been affirmed on appeal by the *Sudder* Court, became final, and could not be set aside by a new suit, and he has relied upon section 16, Regulation III., of 1793, as a bar to the suit. On the 29th of *June*, 1858, the suit was heard before the Principal *Sudder Ameen*, and was by that Judge dismissed with costs. From this decision *Doorga Purshad* appealed to the *Sudder* Court, but that Court, by its decree, dated the 9th of *May*, 1859, affirmed the decision of the Principal *Sudder Ameen*.

The appeal now before us is from the decree of the *Sudder* Court of the 9th of *May*, 1859, and from the decree of the *Zillah* Court of the 29th of *June*, 1858. There is no appeal before us from either of the decrees made in the further suit instituted by *Tara Purshad* against *Doorga Purshad*, their Lordships having, in consequence of delay on the part of *Doorga Purshad*, refused an application made by him for leave to appeal

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from those decrees. *Doorga Purshad* and *Tara Purshad* have both died pending this appeal, and the appeal has been revived and is now in force between their representatives, *Shama Purshad Roy Chowdery* and others, and *Hurro Purshad Roy Chowdery* and another.

The sole question to be considered upon this appeal is, whether *Doorga Purshad* was entitled to recover, in the suit instituted by him against *Tara Purshad*, the sums which had been recovered by *Tara Purshad* from him under the decrees in the suit which *Tara Purshad* had instituted against him; and in considering this question, it must be assumed that at the times when those decrees were made, *Tara Purshad* was rightfully entitled to recover the sums which were payable under them, there not being, as has been mentioned, any appeal from those decrees. *Tara Purshad* insisted in the Courts in *India*, and his representatives have insisted in the argument before us, that *Doorga Purshad* was not entitled to recover these sums for two reasons: first, that his right to recover them is precluded by section 16, *Ben.* Reg. III. of 1793; and, secondly, that, independently of that provision in the Regulation, money which has been paid under a decree or judgment of a Court of competent jurisdiction cannot be recovered in a new suit or action, so long as the decree or judgment under which it has been recovered is subsisting and in force. Upon the first of these points their Lordships have felt but little doubt. Section 16, *Ben.* Reg. III. of 1793, is in these terms:—"The *Zillah* and City Courts are prohibited from entertaining any cause which, from the production of a former decree or the records of the Court, shall

appear to have been heard and determined by any former Judge, or any Superintendent of a Court having competent jurisdiction. If any doubt should arise respecting the competency of the former jurisdiction, the Judges are to report the circumstances to the *Sudder Dewanny Adawlut*, and wait the instructions of that Court." Their Lordships think that this provision applies only to cases in which the question to be determined in the cause is the same question as has been already heard and determined, and not to cases like the present in which new circumstances have intervened, and altered the nature and character of the question to be determined. The intent of the resolution, as it seems to their Lordships, is only to prevent the re-trial of the same question; and it is obvious that there is an essential difference between the question whether *Tara Purshad* was entitled to recover against *Doorga Purshad* before the Order of Her Majesty in Council was pronounced, and the question whether, after that Order was pronounced, he was entitled to hold the money which he had previously recovered.

Upon the second point their Lordships have felt more difficulty. There is no doubt that, according to the law of this country—and their Lordships see no reason for holding that it is otherwise in *India*—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been

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so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process, or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded; and applying this test to the present case, their Lordships are of opinion, that the decrees obtained by *Tara Purshad* against *Doorga Purshad* were superseded by the Order of Her Majesty in Council pronounced in the year 1849. It was plainly intended by that Order that all the rights and liabilities of the parties should be dealt with under it, and it would be in contravention of the Order to permit the decrees obtained by *Tara Purshad* pending the appeal on which it was made to interfere with this purpose. Moreover, the decrees now under appeal rest on precisely the same cause of suit as the original decree which was reversed by the Order of Her Majesty in Council. The plaint in the case on which the original decree was recovered describes the interest recovered by the decrees under appeal as part of the same cause of suit, separated only for the convenience of *Tara Purshad*, and the decrees under appeal, therefore, were mere subordinate and dependent decrees, and their Lordships do not think that these decrees can be held to have remained in force when the decree on which they were dependent had been reversed.

That the *Sudder Dewanny Adawlut* has not, as their Lordships think it might have done, dealt with the decrees now under appeal as falling within the direction given to that Court by Her Majesty's Order in Council, to ascertain, carry out, and enforce the

rights and liabilities of the parties, does not, in their Lordships' opinion, vary the case. This provision in Her Majesty's Order in Council gave power to the *Sudder Dewanny Adawlut* to deal summarily with the rights and liabilities of the parties, but it could not, in their Lordships' opinion, take away any rights which the law would give to *Doorga Purshad* independently of that power. For these reasons their Lordships are of opinion, that the decrees appealed from ought to be reversed, and that the sums of Rs. 8,200. 7. 3. and Rs. 2,927. 8. paid under them ought, so far as the assets of *Tara Purshad* will extend, to be repaid by the now Respondents to the Appellant, with interest at 12 per cent. from the respective times when such sums were respectively paid, and that the now Respondents ought also, so far as *Tara Purshad's* assets will extend, to pay the costs of this appeal; but under the circumstances of the case, and having regard to the delay on the part of *Doorga Purshad*, their Lordships do not think that his representatives are entitled to recover the costs incurred by him in the course of the proceedings taken against him by *Tara Purshad.* Their Lordships, therefore, will humbly recommend Her Majesty to make an Order upon this appeal to the effect which we have mentioned.

MUSSUMUT CHUNDRABULLEE DEBIA *Appellant,*

AND

LUCKHEA DEBIA CHOWDRAIN - *Respondent.**

On appeal from the Sudder Dewanny Adawlut of Bengal.

19th & 20th June, 1865.

THE facts and circumstances of this case sufficiently appear from the judgment of their Lordships:

The appeal was heard *ex parte*, the Respondent not appearing.

* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors:—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

By a *Pottah*, in the nature of a lease in perpetuity, granted by an ancestor of *A.*, in the year 1796, to the ancestor of *B.* of a piece of land, *B.* and his heirs were to enjoy a house built thereon, in consideration of setting up an idol in the house, without payment of rent. Upwards of sixty years after the date of this grant, during which period the idol remained and its worship uninterruptedly continued, no rent having been paid by the grantee or his heirs, *A.* without any demand for rent, or bringing a suit for assessment of the property, brought a suit against *B.* to recover six years' arrears of rent for the house, at the rate fixed by *Ben.* Reg. XIX. of 1793, sec. 10. Held, reversing the decree of the *Sudder* Court, that *B.*, and those under whom she claimed, having been in undisturbed possession, and the cause of action having arisen sixty years before the institution of the suit, such suit was barred by cl. 3, sec. 3, of *Ben.* Reg. II. of 1805.

Held further, that while that clause takes away the cognizance by any Court in *Bengal* of a suit, if the cause of action should have arisen sixty years before the institution of the suit, it distinguishes between the effect of the twelve years' limitation and that of sixty years, by precluding all inquiry into any original defect in the title under which the possession for the latter period obtain, and made it, in effect, unavailing to show that the possession of *A.* commenced under a grant made null and void by the Regulation of 1793.

Whether the twelve years' limitation provided by the *Ben.* Reg. II. sec. 3, cl. 1, of 1805, can be held applicable to such a suit. *Quære?*

Semble. That to maintain such an action, a demand for arrears of rent should have been preceded by a suit for assessment of rent under *Ben.* Reg. XIX. of 1793, sec. 10.

The Attorney-General (Sir *R. Palmer*), and Mr. *Leith*, for the Appellant, argued

First, that the grantor had power to alienate any portion of his estate, *Ben.* Reg. I. of 1793, sec. 9; and that the *Pottah* conveying the house, under which title the Appellant claimed, was expressly sanctioned by *Ben.* Reg. XLIV. of 1793, secs. 6 & 8.

Secondly, that the Courts below had wrongly applied the provisions of *Ben.* Reg. XIX. of 1793, sec. 10, to the case; and

Thirdly, that the suit was barred by acquiescence, as well as by the rules of limitation, *Ben.* Regs. III. of 1793, sec. 14, and II. of 1805, sec. 3.

Their Lordships' judgment having been reserved, was now delivered by

1st Dec. 1865.

The Right Hon. Sir JOHN T. COLERIDGE.

This was an appeal from a decree of the *Sudder Dewanny Adawlut* of *Bengal*, affirming a decree of the Principal *Sudder Ameen* of the Civil Court of *Mymensing*, which last had reversed a decree of the *Sudder Ameen* of the last-named Court in favour of the Appellant. The Respondent has not appeared, and this appeal has been heard *ex parte*.

The original suit was brought by the Respondent to recover arrears of rent for six years and nine months preceding its commencement, and the following may be taken to be the facts of the case:—The Appellant and those under whom she claims had been in peaceable and undisturbed possession of the property for more than sixty years; it is in the town of *Nusseerabad*, and within and parcel of a four-*annas* share of the *Zemindary* of *Pergunnah Allapsingy*, of

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which the Respondent, as mother and guardian of her son, a minor, is the proprietor in possession. The Appellant claims under a grant from the ancestor of the Respondent, which purports to have been made for the setting up an idol, and concludes thus—"Having set up the said idol in the said house, you will enjoy the same without paying rent through sons and grandsons. For this purpose I have given you this *Bromuttur Pottro*." The date of this instrument corresponds with the 10th of *February*, 1796 A.D. The idol has remained, and its worship has been continued uninterruptedly from that time. The Respondent's plaint, which was not filed until the 15th of *April*, 1857, was preceded by no demand of rent, nor any suit for the assessment of it; but the rent sued for is stated to be "in accordance with the rate of rent obtaining in lodging-houses at this place of *Nusseerabad*:" this rate being fixed by the *Ben.* Reg. XIX. of 1793, sec. 10; on which, indeed, the Respondent's case entirely depends.

These are all the facts, and it seems clear that if the original grant has not been annulled by any Regulation, or if the possession has become unimpeachable by reason of the lapse of time, either of the twelve years or of the sixty years prescribed by the *Bengal* Regulations; or if, at all events, it was under the circumstances necessary that this action should have been preceded by a suit for assessment of the rent, or a demand of rent ascertained in some way or other; the original suit could not be maintained, and the two later decrees must be reversed. They were impeached by the Appellant on all these grounds. Their Lordships, however, do not find it necessary in this case to give any opinion upon the first or third of these

points, or upon the question whether, under the circumstances of this case, the twelve years' limitation prescribed by the Regulations ought to be held applicable to it. They have reason to believe that questions of some importance, and possibly of some difficulty, have been raised, and that some cases which were not cited at the Bar have been decided in the Courts in *India*, bearing more or less directly on some, at least, of these points, and they think it would neither be prudent nor safe for them, more especially in a case which has been argued on one side only, to give any opinion which might affect these questions. Moreover, it is obvious that to decide this case upon the last of the grounds on which the Appellant relied, might only lead to renewed litigation. Their Lordships, therefore, abstain from giving any opinion whatever upon any of these points.

It may be assumed, for the purpose of argument, but for that purpose only, and without the expression of any opinion by their Lordships, that all these points ought to be decided in favour of the Respondent; but they are of opinion that the Appellant was entitled to have the suit dismissed upon the ground of there having been peaceable possession by her and by those under whom she claims for sixty years before the suit was commenced, and of the suit being, therefore, barred by the early part of the 3rd clause of the *Ben.* Reg. II. of 1805.

The first and second clause, and the second branch of the third clause, of this Regulation have reference to the twelve years' limitation which was previously in force, explaining and qualifying that limitation; and as their Lordships do not, as has been already said, rest their judgment on this limitation,

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it is unnecessary to comment on these parts of the Regulation; but the first branch of this third clause provides that "nothing in the preceding clause, or in any part of the existing Regulations, shall be held to authorize the cognizance of any suit whatever in any Court of Justice, if the cause of action shall have arisen sixty years before the institution of the suit; nor shall any plea on the part of the Plaintiff for the non-prosecution of his claim of right during a period of sixty years after the origin of his alleged cause of action, nor any original defect of title on the part of the possessor of the property claimed, after the lapse of such period, be deemed a sufficient ground for taking judicial cognizance of any suit so preferred." This branch of the clause, therefore, in its very comprehensive language, embraces every then existing Regulation by which any Court in *Bengal* was authorized to take cognizance of any suit whatever; it, in effect, takes away that authorization if the cause of action shall have arisen sixty years before the institution of the suit; it distinguishes between the effect of the twelve years' limitation and that of sixty, by precluding all inquiry into any original defect in the title under which the possession for the latter period commenced; it makes it, in effect, in cases in which the section applies, unavailing to show that the possession of the Appellant commenced under a grant made null and void by the Regulation of 1793.

The question then is, what is the cause of action in the present case, and when did it arise? In terms the suit is brought to recover rent for the last six or seven years, and the non-payment of that rent is, no doubt, in one sense, the cause of action.

The suit, indeed, may in some sense be likened to

what is of daily occurrence, the action to recover the later items only of a long account, which have become due within six years, although the Statute of limitations has barred the demand for the earlier items. The distinction, however, between such an action and the present suit, is obvious; the items of an account are independent of each other: each represents a distinct contract or a distinct debt. But the right to recover rent for the last six or seven years, depends on a possession founded on a grant avoided by the Regulation, which possession has been one and entire in character through the whole sixty years.

It is the case of the Plaintiff in the Court below, that by reason of the character of the grant and the operation of the Regulation, his ancestor might have determined the possession in the first year of its existence, or claimed rent at the end of that year. If, in spite of length of possession, an action for use and occupation could be maintained, so long as a Plaintiff could show a good title in himself and a bad one in the occupier, of what avail would any Statute of limitations be? A man might be barred in an action directly brought to recover the possession, such as ejectment, and yet not be barred when he sued from year to year, for use and occupation, for a compensation for the fruits of the land; because in this the occupation would be referable to the sufferance and permission of the real owner, and so be a good consideration for an implied promise to pay what it was worth. But this clearly could not be; and so here, if no action could be maintained directly to recover the possession of the land, none can be brought to recover the rent, which is the compensation for the

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occupation—that occupation having been always of one and the same character; in fact, rent free.

Their Lordships being of this opinion, will, therefore, humbly advise Her Majesty that this suit was barred by the sixty years' possession of the Appellant, and those under whom she claims, and, therefore, that the original judgment of the *Sudder Ameen* dismissing it ought to be affirmed, and the two later judgments reversed, and the costs of all the proceedings below, with those of this appeal, be paid by the Respondent.

SREENANTH BHUTTACHARJEE - *Appellant,*

AND

RAMCOMUL GUNGOPADYA, GOBIND CHUNDER MOZOOMDAR and others } *Respondents.**

On appeal from the Sudder Dewanny Adawlut of Bengal.

20th & 21st June, 1865.

THE Appellant in this appeal brought a suit, in the nature of an action of ejectment, in the *Zillah* Court of the Twenty-four *Pergunnahs* against the

By section 2 of Act, No. XIX. of 1843, it is enacted, that "every deed of sale, or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered

* Present:—Members of the *Judicial Committee*—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.

Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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Respondents to recover possession of 28½ *mouzahs*, being a moiety of the *Zemindary*, *Pergunnah Haveleeshur*, with mesne profits of the villages, then in the possession of the Respondent, *Gobind Chunder Mozoomdar*, as registered owner. The *Zemindary* had been conveyed to him by the Respondent, *Ramcomul Gungopadya*, a former mortgagee, who had acquired the proprietary right of the *Zemindary* under a foreclosure proceeding and suit for possession.

The question in the suit was one of title. The Appellant claimed the moiety of the *Zemindary*, under a *Kabala*, or Bill of Sale, dated the 27th of *March*, 1854, made by one of the Respondents, named *Taraprosono Mookerjee*, who, it was insisted by the Appellant, had previously purchased the moiety of the *Zemindary* from *Ramcomul Gungopadya*, and that a deed had been executed by him conveying to *Taraprosono Mookerjee* the moiety in consideration of certain pecuniary transactions subsisting between them in relation to *Ramcomul Gungopadya's* mortgage. The defence of

deed—and that [from the 1st day of *May*, 1843] every deed of mortgage on land, houses, and other real property, as well as certificates of the discharge of such incumbrances, a memorial of which has been or shall be duly registered according to law, and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding." Held:—

First, that the words in the latter part of the section, "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding" applied not only to deeds and certificates of mortgage, but also to deeds of sale or gift; and

Secondly, that the proviso, that "its authenticity be established to the satisfaction of the Court" pointed out merely the exclusion of a fraudulent deed from the benefit of the Act, as it was not intended that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as a *bonâ fide* deed.

A registered deed cannot be deprived of the priority given by Act, No. XIX. 1843, unless it be proved that there was fraud on the part of the grantee.

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the Respondent, *Gobind Chunder Mozoomdar*, to the Appellant's claim was, that he was entitled to the whole *Zemindary* under a deed of conveyance in the English form, dated the 5th of *April*, 1854, executed by *Ramcomul Gungopadya* for a good consideration, which deed, as well as a deed of release of even date from *Taraprosono Mookerjee*, for the moneys advanced by him in respect of *Ramcomul Gungopadya's* mortgage, were registered on the 20th of *April*, 1854, in the proper office of the Registrar of deeds of the *Zillah* of the Twenty-four *Pergunnahs*, previous to the registration of the alleged *Kabala*, set up by the Appellant.

By sec. 2 of Act, No. XIX. of 1843, (*a*) preference is given to a registered deed, over one, although of an earlier date, subsequently registered under the provisions of that Act.

When the cause came before the Principal *Sudder Ameen* (*Baboo Tarucknath Sein*), he dismissed the suit, on the ground, that the Appellant's title could not be maintained, as the deeds, including the *Kabala*, on which he founded his claim, were, in his opinion, forgeries, and upheld the title of the Respondent, *Gobind Chunder Mozoomdar*. The Appellant appealed from this decree to the *Sudder Dewanny Adawlut* at *Calcutta*. The decree of that Court (which consisted of Messrs. *Raikes*, *Trevor* and *Loch*), was to the effect, that there was no pecuniary consideration for the alleged conveyance from *Ramcomul Gungopadya* to *Taraprosono Mookerjee*, and in the absence of such consideration, the title of the Respondent, *Gobind Chunder Mozoomdar* could not be affected by that conveyance, and accordingly the appeal was dismissed with costs. Hence the present appeal.

(*a*) See section set out, post p. 226.

Mr. *Hobhouse*, Q.C., and Mr. *Cave*, for the Appellant, contended,

First, that *Ramcomul Gungopadya's* title being undisputed, the Bill of Sale made by him to *Taraprosono Mookerjee*, and the conveyance afterwards executed by the latter in the Appellant's favour, being genuine instruments for valuable consideration, passed the moiety of the *mouzahs* in suit to the Appellant.

Secondly, that the conveyance executed by *Taraprosono Mookerjee* in favour of the Respondent, *Gobind Chunder Mozoomdar*, was fraudulently concocted for the purpose of defeating the Appellant's claim, and, therefore, was not entitled under the Act, No. XIX. of 1843, secs. 2 and 3, by reason of its earlier registration, to be preferred to the prior deed of sale executed by *Taraprosono Mookerjee* in favour of the Appellant.

The Attorney-General (Sir *R. Palmer*), and Mr. *Leith*, appeared for the Respondent, *Gobind Chunder Mozoomdar*, but were not called upon to address their Lordships.

Judgment having been reserved, was now pronounced by 20th July, 1865.

The Right Hon. the Lord Justice TURNER.

In disposing of this appeal their Lordships do not think it necessary to enter fully into the details of the case. The view they take of it will be sufficiently explained by a mere general outline of the facts. *Ramcomul Gungopadya* was originally mortgagee of the entirety of the *Zemindary, Pergunnah Havaleeshur*. He subsequently acquired the full proprietary right to and possession of the *Zemindary* by a foreclosure

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suit, and suit for possession consequent thereon, and after he had thus acquired the proprietary right in the *Zemindary* he applied for the mutation of names in the Collectorate, and was there registered as sole proprietor of the whole *Zemindary*. The Appellant, *Sreenanth Bhuttacharjee*, alleges that *Ramcomul Gungopadya* before he had acquired the proprietary right in the *Zemindary* by an *Ikrar*, or agreement for sale, dated the 20th of *December*, 1852, agreed with the Respondent, *Taraprosono Mookerjee*, that in the event of his acquiring the proprietary right, he would transfer a moiety of the *Zemindary* to *Taraprosono Mookerjee*, and that after he had acquired the proprietary right, he, by a *Kabala*, or deed of sale, dated the 31st of *July*, 1853, transferred the moiety of the *Zemindary* to *Taraprosono Mookerjee* accordingly. The moiety of the *Zemindary* thus transferred to *Taraprosono Mookerjee* was, as the Appellant alleges, afterwards conveyed to him by deed, bearing date the 27th of *March*, 1854; but this deed was not registered until the 2nd of *May*, 1854. In the meantime, and on the 5th of *April*, 1854, *Ramcomul Gungopadya*, by a deed of that date, in consideration of the sum of Rs. 90,000, conveyed the whole *Zemindary* to *Gobind Chunder Mozoomdar*, and by a deed of even date, *Taraprosono Mookerjee*, in consideration of the sum of Rs. 15,000, also conveyed all his interest in the *Zemindary* to *Gobind Chunder Mozoomdar*, and on the 20th of *April*, 1854, both these deeds were duly registered.

After the execution of these deeds, *Gobind Chunder Mozoomdar* had possession of the whole *Zemindary*, and he was in possession of it when the suit out of which this appeal has arisen, was instituted.

This suit, which is in the nature of an ejectment

suit, was instituted by the Appellant against *Ramcomul Gungopadya*, *Gobind Chunder Mozoomda*, and *Taraprosono Mookerjee*, and several other persons, for recovering the moiety of the *Zemindary* alleged to have been conveyed to the Appellant in manner above mentioned. The plaint in the suit alleges, that *Ramcomul Gungopadya*, through fraudulent motives, had disposed of the whole *Zemindary* (including the moiety previously sold by him to *Taraprosono Mookerjee*) to *Gobind Chunder Sein* in the fictitious name of *Gobind Chunder Mozoomdar*, under a *Kabala*, dated the 4th of *April*, 1854, for consideration of Rs. 90,000, but the plaint contains no allegation whatever of any fraud on the part of *Gobind Chunder Mozoomdar*.

Gobind Chunder Mozoomdar by his answer wholly denies the title set up by the Appellant, and rests his case on the conveyance to him by *Ramcomul Gungopadya*. He sets up no title under *Taraprosono Mookerjee*, and, on the contrary, he says, that *Taraprosono Mookerjee* had no right or interest in the *Zemindary*, but it appears, both by the answer and throughout the proceedings in the suit, that *Taraprosono Mookerjee* had under his alleged *Ikrar* and *Kabala* set up claims to the property, and the answer in effect, treats the release from him as obtained for the purpose of putting an end to those claims. There is a great deal of evidence in the suit, with reference for the most part, to the alleged *Ikrar* and *Kabala* set up by the Appellant; but on the hearing of the cause before the Principal *Sudder Ameen*, he dismissed the suit, and upon appeal this decree was affirmed by the *Sudder* Court. The appeal before us is from these decrees.

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The judgments, both of the Principal *Sudder Ameen* and of the *Sudder* Court, appear to have proceeded upon a full and careful examination of the facts of the case; but their Lordships, as they have intimated, do not find it necessary to enter upon this examination.

It appears that by the Act, No. XIX. of 1843, it is provided, "that from the first day of *May* last past, every deed of sale, or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed—and that from the said day every deed of mortgage on land, houses, and other real property, as well as certificates of the discharge of such incumbrances, a memorial of which has been or shall be duly registered according to law, and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding."

Their Lordships are of opinion, that this case may well be decided, and ought to be decided, upon the provisions of this Act.

Two questions arise upon the Act: first, whether

the words at the close of the enactment, "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such unregistered deed or certificate notwithstanding," are to be construed as referring only to the mortgages and certificates mentioned in that part of the enactment which immediately precedes these words, or are to be taken to extend also to the deeds of sale or gift which are mentioned in the earlier part of the enactment; and, secondly, what meaning is to be attributed to the words "provided its authenticity be established to the satisfaction of the Court," which are contained in the enactment. As to the first question, their Lordships are of opinion, that upon the true construction of the Act, the words first above mentioned apply not only to deeds and certificates of mortgage, but also to deeds of sale or gift. This enactment, although divided into two branches, in consequence of the different effect which is given to it as to deeds of sale and of mortgage, was plainly intended to be a general enactment. The words we are considering are words of reference, and the terms used being general and comprehensive, their Lordships see no reason for confining their operation to one branch of the enactment rather than extending it to both. Had it been intended that they should be so confined there would have been no difficulty in expressing that intention. It would be difficult to find any reason why, in the case of a mortgage, priority should be given to a registered deed over an unregistered deed, notwithstanding knowledge or notice of the unregistered deed by the registered mortgagee, but in the case of a sale the priority of an unregistered deed over a registered deed should be retained, in cases of knowledge or

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notice, by the registered vendee or donee. The too common practice in *India* of setting up forged and fraudulent deeds, and the security against this practice which is afforded by registration, are quite sufficient to account for this enactment extending both to sales and mortgages, and the policy of such enactments is not unknown in other countries. The Irish Registration Acts afford an instance of it.

Then as to the second question. The proviso is, that the authenticity of the deed be established to the satisfaction of the Court. The word "authenticity" would seem, according to its natural meaning, to point merely at the exclusion of a forged deed from the benefit of the Act; but their Lordships think that it could not be intended by the Act that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as an honest and *bonâ fide* deed. They are not disposed so to construe the Act, but they think that at all events a registered deed cannot be deprived of the priority given by the Act, unless it be both alleged and proved that there was fraud on the part of the grantee, and in this case no fraud is alleged, and certainly none is proved, on the part of *Gobind Chunder Mozoomdar*. It would be going much too far to impute fraud to a purchaser upon the mere ground that he had bought up a possible claim, and so far as their Lordships can find, there is nothing beyond this affecting *Gobind Chunder Mozoomdar* either in point of allegation or of proof. Of course it has not escaped their Lordships' attention that there is an allegation in the plaint which suggests collusion between *Gobind Chunder Mozoomdar* and *Taraprosono Mookerjee*, but their Lordships see no proof of this. Upon the whole,

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therefore, they are of opinion that *Gobind Chunder Mozoomdar's* deed being first registered, must prevail over the subsequently registered deed of the Appellant, and they must, therefore, without entering further into the case, humbly recommend Her Majesty to dismiss this appeal, and with costs.

MURTUNJOY CHUCKERBUTTY - - *Appellant;*

AND

JOHN COCKRANE, Official Assignee of the estate of Messrs. HICKEY, BAILEY, & Co., Insolvents - - } *Respondent.**

On appeal from the Sudder Dewanny Adawlut at Calcutta.

23rd & 24th June, 1865.

THIS suit was brought by the Respondent in the *Zillah* Court of *Moorshedabad*, to recover from the

A manufacturer of silks in *Bengal* employed a firm at *Calcutta* as Factors for the sale of his goods on commission. Generally the shipments and consignments to *England* were in the name of the Principal, but as the market was depressed at *Calcutta*, the Factors on several occasions shipped a portion of the goods to *England*, consigning them in their own names. There was a loss on the sales in *England* of the goods so consigned: Held:—there being no peculiar custom of trade existing in *Calcutta* to qualify the general mercantile law of *England*, in respect to Principal and Factor; and in the absence of evidence of any special instructions by the Principal, that such consignments by the Factors was within the scope of their general discretion, and the loss was properly charged on account of the principal.

By an agreement between Principal and Agents, 10 per cent. was to be allowed as commission. The *Sudder* Court, under Act, No. XXXII. of 1839, allowed 12 per cent. per annum from the date of the suit, on the amount found due to the Agents: such rate of interest disallowed on appeal, as that Act does not apply to an agreement between parties regulating the amount of interest.

Where a partial alteration was made by the appellate Court in the decree of the Court below, as to the rate of interest awarded, but in other respects the decree was affirmed, both parties were directed to pay their own costs of appeal.

* Present: Members of the *Judicial Committee*—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir Edward Vaughan Williams.

Assessors: The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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Appellant the balance of a mercantile account stated to be due to the insolvent firm of *Hickey, Bailey,* & Co., for principal and interest at the time of their insolvency, amounting to Rs. 54,784. 4a. 9p. to which sum interest was added, calculated partly at 10 and partly at 12 per cent. per annum, during the subsequent period and up to the 31st of *August,* 1856, making the alleged debt Rs. 1,10,938. 4a. 6p.; but as the amount of interest more than doubled the amount of the principal money (which excess could not be recovered against the Appellant by a rule of the Courts in *India*), the Respondent relinquished a sum of Rs. 10,938 4a. 6p. from the amount alleged to be due as interest, and laid the amount sought to be recovered at Rs. 1,00,000, and interest thereon to the day of payment.

The facts were these:—

The Appellant was in and previous to the year 1840 a dealer and manufacturer of raw silk and silk piece goods, called "Corahs," at *Junghypore,* in the Presidency of *Bengal,* and in the latter year employed the firm of *Hickey, Bailey,* & Co., then carrying on business in *Calcutta* as Brokers, to act as his Agents, in receiving from him, from time to time, consignments of his goods and selling them on commission. The dealings between the parties continued up to a short period of the firm's being declared insolvent, which took place on the 17th of *February,* 1848.

Out of the above consignments shipments were made under the express authority of the Appellant by *Hickey, Bailey,* & Co., first to Messrs. *Price, Griffiths,* & Co., and afterwards to *Van Notten* & Co., as consignees in *England* for sale, during the years 1840, 1841, 1842, 1843, and 1845. The in-

voices of those shipments were invariably made out by *Hickey, Bailey,* & Co., as directed, in the same form, stating that the goods therein mentioned were shipped by *Hickey, Bailey,* & Co. to *London,* for sale on account and risk of the Appellant; his name and manufactures being well known both in the *Calcutta* and *London* markets; and his goods, by reason of the superiority of his manufacture, being sought after and bearing the highest price in those markets. The accounts, sales, and letters of advice respecting these shipments were made out and written by the consignees in *England,* in the name of the Appellant, to whom they were accordingly dispatched, and by whom they were received in *India.*

The Appellant, in the months of *January, February,* and *March,* 1846, had made considerable consignments of silk goods for sale on his account to *Hickey, Bailey,* & Co.

It appeared that, on account of the *Calcutta* market being depressed and unfavourable, certain goods remained in hand in the month of *April,* and could not be advantageously sold in *Calcutta,* and the Appellant gave permission to *Hickey, Bailey,* & Co. to ship the same for sale in *England,* as had been previously done.

The Appellant afterwards received a letter bearing date the 13th of *April,* 1846, from *Hickey, Bailey,* & Co., which contained the following passage:—"Our market continues worse every day. After having failed in attempting to sell your silk, we have, according to your request and instructions, shipped the whole on your account to *London,* the particulars of which will be forwarded to you in due course."

The Appellant insisted in the Court below, that he had not in the instructions given by him to *Hickey,*

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Bailey, & Co. given any direction to alter or vary the established usage as regarded the shipments of his goods, which had been previously always made in his name, and that the goods last mentioned had been shipped on *Hickey*, *Bailey*, & Co.'s own account; and, in consequence, he disputed his liability in respect of such shipments.

The account sales of these shipments were made out, by the consignees in *England*, in the name, and on the account, of *Hickey*, *Bailey*, & Co.

The first information as to these shipments given to the Appellant, was by a letter sent to him by *Hickey*, *Bailey*, & Co., dated the 5th of *August*, 1847, and invoices sent with it.

By the decree of the *Zillah* Court (Mr. *A. Pigou*, presiding Officiating Judge) it was ordered that the Appellant should pay the sum of Rs. 1,00,000, with interest at 12 per cent. Upon appeal from this decision to the *Sudder Dewanny Adawlut* at *Calcutta*, that Court (consisting of Messrs. *Trevor*, *Bailey*, and *Steer*,) decreed to the Respondent the principal sum of Rs. 54,784 4a. 9p., minus the difference between 10 per cent. on Rs. 89,584 and the rate of 12 per cent. calculated thereon in the account made up to *April*, 1847, the previous accounts showing the rate agreed to between the parties to be only 10 per cent. per annum, but the Court, under the Act, No. XXXII. of 1839, gave interest upon the principal sum from the date of the institution of the suit to the date of realization at the rate of 12 per cent.

On the appeal from this decree to the Privy Council, the principal point turned upon the accounts, which raised the question, whether the claim of the Respondent could be sustained in accordance with the mer-

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cantile custom and usage of *Calcutta* and the mode of dealing between the Appellant and the late firm of *Hickey, Bailey*, & Co. The material evidence upon this point is stated in their Lordships' judgment.

It was contended on appeal by the Appellant, first, that goods were delivered to the late insolvent firm for sale on commission on behalf of the Appellant, but that *Hickey, Bailey*, & Co. had consigned them to *England*, in their own names and at their own risk, and that the Respondent, as Official assignee, had failed to discharge that firm from the obligation of accounting for those goods and for the proceeds of the sale thereof in the usual manner as between Principal and Agents in taking the accounts; and secondly, that the decree of the *Sudder Dewanny* Court ought not to have decreed interest on the consolidated amount of principal and interest from the date the suit was brought, nor at the rate of 12 per cent. per annum, under the Act, No. XXXII. of 1839, when the rate agreed between the parties was 10 per cent.

The Attorney-General (Sir *R. Palmer*), and Mr. *Leith* for, the Appellant; and

Sir *FitzRoy Kelly*, Q.C., and Mr. *Macpherson*, for the Respondent.

Their Lordships' judgment was pronounced by

20th July, 1865.

The Right Hon. the Lord Justice TURNER.

The Appellant in this case is the owner of silk filatures, and a dealer in silk of *Junghypore*, a district in *Bengal*. The Respondent is the Official assignee of an insolvent firm that formerly carried

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on business in *Calcutta*, under the style of *Hickey, Bailey*, & Co.

That firm from the year 1840 up to the end of 1847 acted as the Factors and Agents of the Appellant; selling some of the goods consigned to them by him in *Calcutta*, and shipping others to *London* for sale there; and the following seems to have been the course of dealing between them:—The Appellant was in the habit of drawing on *Hickey, Bailey*, & Co., against the goods consigned to them, and they accepted and paid his drafts, charging him in account with the amount of them. If they sold the goods in *Calcutta*, they rendered the account sales to him, and credited him with the proceeds. Against the goods shipped to *London* they drew Bills in sterling money upon the consignees; but credited the Appellant in account with the proceeds of those Bills in rupees at the rate of exchange at which they were sold in *Calcutta*; and on receiving the account sales from *London*, they either gave him further credit for the profit, or debited him with the loss on each shipment, according to the final result of the transaction. The account current so kept was balanced on the 30th of *April*, in each year, and, from time to time, rendered to the Appellant. From the year 1840 up to a period which, as found by the Courts below, we may take to have been some time in 1845, the consignments to *London* were shipped by *Hickey, Bailey*, & Co., to the consignees "for sale on account and risk of *Murtunjoy Chuckerbutty*." Examples of invoices appear in the record. About the year 1845, some change took place in the constitution of the firm of *Hickey, Bailey*, & Co., and either contemporaneously with, or shortly after that event, the shipments on account of the Appellant were made in

a different form; most of the invoices stating the goods to be shipped by *Hickey, Bailey*, & Co., and consigned to the *London* house for sale "on account of the concerned;" and one or two stating them to be consigned for sale on account of *Hickey, Bailey*, & Co. Examples of the first of these two classes of invoices appear in the record. All the latter invoices however continued to specify the mark or brand by which the Appellant's silks were known in the market. It is upon the variation in the form of the consignments made in and subsequently to 1845 from that of the consignments made before that year, that the principal question on this appeal is raised.

The disputes between the Appellant and *Hickey, Bailey*, & Co. began in 1847, the year so disastrous to commerce in *India*. The letters of the 27th of *November*, 1845, and the 21st of *February*, 1846, show that from a date as early as the latter part of 1845, the silk market, both in *Calcutta* and in *London*, was in a state of great depression. On the 13th of *April*, 1846, Messrs. *Hickey, Bailey*, & Co. wrote to the Appellant: "Our market continues worse every day. After having failed in attempting to sell your silk, we have, according to your request and instructions, shipped the whole on your account to *London*, the particulars of which will be forwarded to you in due course." And accordingly their letter of the 23rd of *December*, 1846, contains this passage: "We also inclose invoices of 64 bales silk, and 900 pieces of your good corahs shipped on your account to *London*; the sums drawn against these shipments, as per memorandum at foot, viz.: Rs. 54,816. 12a. 6p. have been carried to your credit under due dates."

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It is not difficult from this memorandum, and by means of the quantities of silk, and the dates and amounts of the Bills there specified, to identify the shipments so advised with the shipments of 7 bales per "*Oriental*," and 8 bales per "*Tartar*," to *Magniac, Jardine*, & Co., the shipment of 13 bales per "*Kelso*," to *S. Phillips* & Co., the shipment of 18 bales per "*Essex*," to *H. J. Johnston* & Co., the shipment of 18 bales per "*Cressy*," to *Cockerell* & Co., and the shipment of 4 cases of corahs, also per "*Cressy*," to *Thurburn* & Co., which are respectively mentioned in the accounts. The losses on these shipments are amongst those his liability to which the Appellant disputes; and many, if not all, of them must have entered into the accounts which were the subject of the correspondence that will be next mentioned.

In *August*, 1847, Messrs. *Hickey, Bailey*, & Co. wrote to the Appellant their letter of the 5th of that month. The most important passage in it is the first paragraph, which is in these words: "We beg to wait upon you with the following:—A statement of your account current exhibiting on the 30th of *April* last a balance in our favour of Co.'s Rs. 13,171. 3. 7., and a continuation of the same in open account to date showing a balance against you of about Rs. 31,882. 6. 5. Four account sales from Messrs. *Magniac, Jardine*, & Co., *Samuel Phillips* & Co., and *Cockerell* & Co., of *London*, comprising 69 bales of your silk, and three account sales comprising 51 bales of theirs." This letter also expresses an unwillingness in the then state of the markets to receive any further consignments "drawn against;"

and presses the Appellant to place the house in funds either by remittances or goods.

The Appellant's answer to this communication was dated the 12th of *August*, 1847. After professing himself confounded by the letter of the 5th, he says: "The cost of the goods I consigned to you was Rs. 5,000 or 8,000 more than I drew on you, and I believed you owed me that sum at least, but in your letter you make me your debtor more than Rs. 31,000. I am ashamed to hear this. Your old house several years has sent silk and corahs to *England* on my account, and the *London* houses have ever sent account sales, &c., for every transaction in my name, and I have these accounts in my hand. Your new house, I don't know how, has taken a new manner of business, and all the account sales sent to me now are copies signed in *Calcutta*; this does not satisfy me at all, and, therefore, I want the *London* account sales as formerly. There are many particulars I want to know in these sales, because I see in your copies several sales on account of the concerned. Until I have the particulars I will not examine the account current, and I request you will send them to me as quick as possible."

In reply, *Hickey, Bailey*, & Co., on the 28th of *August*, 1847, sent a letter, in which they forwarded, though under a kind of protest, the original accounts demanded; complained of the tone of the Appellant's letter to them; and again pressed for payment of the balance due to them.

There is no evidence of any further correspondence between the parties until *October*, 1847. On the 11th of that month, *Hickey, Bailey*, & Co. wrote a letter to the Appellant, which is not in evidence.

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From the references to it in the subsequent correspondence, we may infer that it contained an account corresponding more or less closely with that mentioned in the record as No. 1.

In answer to it the Appellant wrote the letter of the 25th of *October*, and in which he for the first time put forward distinctly the case on which he now relies. He says, "I am very anxious to settle my two years' accounts with you. I hereby send you the copy of the abstract of your letter dated the 11th of *October*, 1846, for your inspection. In your opinion my goods created a good name in the *London* markets, so relying on your statement I desired you to ship a quantity of my silk, but you in contravention to your practice shipped them in your own name instead of mine, and, therefore, owing to my name being suppressed, I hold you responsible for the loss. It is very easy to settle accounts. I will only debit you with the invoice cost of the goods shipped by you to *London;* likewise, I will debit you with amount of the account sales sent by you with interest. You may also, according to former practice, debit in my name the amount I received from you with interest, and also costs."

The reply of *Hickey, Bailey,* & Co. to this is dated the 30th of *October*. After explaining the letter of the 11th of *October*, 1847, they say, "Regarding the shipments, we must beg to observe that the invoices of your property have been uniformly worded according to the practice followed in *Calcutta*, 'on account of the concerned,' under your well-known filature mark, and not in our name as you pretend, which, however, would make no difference in the result of the operations. You were fully made aware

of those shipments by our letter of the 23rd of *December*, 1846, &c., and, therefore, cannot at this late hour, because the result has been a loss, pretend to have no personal interest, and decline all responsibility in shipments made on your account, and to which you have till now made no objections, you having on the contrary, in many of your letters, directed us to ship your goods on your own account, and not to sell them in *Calcutta*, evidently because you expected a more profitable realization of them by so doing. We, therefore, beg to hand you again a statement of your account closed 30th of *April* last, showing a balance in our favour of Company's Rs. 22,312. 9. 6., and a continuation of the same in open account, showing a balance against you up to date of Company's Rs. 48,547 1. 0. This account, you will see, has been corrected, owing to a mistake in crediting you with a draft for Rs. 10,000, against a shipment which had nothing to do with your account." The right to make this correction is also a material question on this appeal.

The Appellant replied to this letter by that of the 18th of *November*. The following are the material passages in it: "I am informed of the particulars from the contents of your letter dated the 30th of *October*, which reached me at a time when I was busily engaged in preparing your accounts, and consequently could not reply to it. I am now sending you the account for your inspection, bearing a balance of Rs. 1,390. 12. 1. in my favour, which please let me have. The points treated by you in your letter may be true in your opinion, but in my opinion they are improper, for my goods were unjustly shipped to *England*. Notwithstanding this I have forwarded

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Bills to you, and debited you with the cost price of them. I have credited you with the amount you paid to me, and entries have been made regarding your commission and discount according to the former practice."

Messrs. *Hickey, Bailey,* & Co. stopped payment early in *January,* and were formally adjudged insolvents on the 17th of *February,* 1848. In their schedule the claim against the Appellant was entered as "disputed." The Respondent afterwards became the Official assignee of this insolvent estate, and some correspondence appears to have passed between him and the Appellant touching the disputed claim on the latter in *June* and *July,* 1849. He continued to insist on his view of his rights, and, instead of admitting anything to be due from him to the estate of *Hickey, Bailey,* & Co., to contend that the sum of Rs. 1,390. 12. 1. was due to him on the balance of the account as made out by him.

In *July,* 1857, after a delay not very satisfactorily accounted for, on the ground of the poverty of the estate and the complexity of the accounts, the Respondent, under the authority of the Insolvent Court, commenced an action in the *Zillah* Court of *Moorshedabad* against the Appellant for the recovery of Rs. 1,00,000, the balance alleged to be due on this disputed account. The plaint showed that the balance claimed to be due at the date of the insolvency, with the subsequent interest, amounted to Rs. 1,10,938 and a fraction; but relinquished all in excess of the Rs. 1,00,000, in pursuance of a rule which obtained in the Courts of the East India Company, and forbade a Plaintiff to recover more than double the amount of his principal debt.

The judgment of the *Zillah* Court, which is dated the 2nd of *February*, 1859, decreed the whole amount claimed to the Respondent, with interest at the rate of 12 per centum per annum from date of suit to date of payment.

On appeal, the *Sudder Dewanny* Court by its judgment, dated the 24th of *February*, 1862, confirmed this judgment on all points except the calculation of interest. It held that the sum claimed as principal money and the balance due to the insolvent firm in *February*, 1848, being Rs. 54,784. 9., should be corrected by the deduction of the difference between 12 and 10 per cent. interest on the account between the 30th of *April*, 1846, and the 30th of *April*, 1847; it refused to allow the Respondent any interest on the sum so ascertained during the period in which he had delayed to bring his suit, but gave him interest on it from the date of the commencement of the suit to the date of payment, at the rate of 12 per centum per annum.

From these decrees the present appeal is brought; and the substantial questions to be determined upon it (some minor points that were raised on the pleadings have been given up in the Courts below or here), seem to be reduced to the following, viz:—

First, whether the Appellant is properly chargeable with the balance of the account between him and the late firm of *Hickey*, *Bailey*, & Co., taken on the principle on which this account has been taken, or whether he is now entitled to have that account taken on the principle asserted in his letters of the 25th of *October* and 18th of *November*, 1847, viz., that of treating all the later shipments to *England* as made by *Hickey*, *Bailey*, & Co. at their own risk, and of

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debiting them with the prime cost, or other assumed value of the goods in *Calcutta* at the dates of the shipments?

Second, whether, assuming the shipments to have been made at the risk of the Appellant, it is proper, under the circumstances, to charge him with the amounts of the re-drafts from *London?*

Third, whether he is entitled to any, and what relief in respect of the item of Rs. 10,000, withdrawn by *Hickey, Bailey,* & Co., from the amount as mentioned in their letter of the 30th of *October,* 1847?

Fourth, whether the interest on the balance due by him has been correctly calculated?

The first question involves the inquiry, whether *Hickey, Bailey,* & Co., when they made the consignments of the Appellant's goods in the form in which they are shown to have made them subsequently to the year 1845, were guilty of any breach of the duty which either the general law, particular custom, or special contract between them and their Principal, imposed upon them as Factors. In the Court below evidence was given to show what are the general powers of Factors in *Calcutta* who are employed to ship goods for sale in *England* on account of their Principal. Their Lordships apprehend that this evidence was adduced not so much for the purpose of establishing that any peculiar custom of trade obtained in the port of *Calcutta,* as for that of showing what was the general law; the country Courts of *India* not being very conversant with questions of Mercantile law, and not recognizing the law of *England* as the *lex fori.* But, however that may be, their Lordships are of opinion, that the evidence altogether fails to show that any particular usage or custom qualifying

the Mercantile law of England, as between Principal and Factor, prevails at *Calcutta*. It is, therefore, by the general Mercantile law that the powers and duties of *Hickey, Bailey*, & Co., in making their consignments of the Appellant's goods, must be determined.

Again, their Lordships see no ground for dissenting from the exposition of the law which is contained in the careful judgment of the *Sudder* Court. They are of opinion, that *Hickey, Bailey*, & Co., as Factors, having an interest by reason of their advances in the Appellant's goods, were justified in shipping those goods for sale either "on account of those concerned," or "on account of themselves," unless their general authority was controlled by instructions from their Principal, or by contract. Of positive instructions or of express contract there is no proof. The existence of either, if to be inferred at all, is only to be inferred from the evidence of the course of dealing before 1845.

Again, their Lordships are of opinion, that even if there were nothing to set against the course of dealing so proved, the inference from it that the general discretion of the Factors in respect of all future consignments had been controlled, would hardly be safe or legitimate. But, in truth, the prior course of dealing is not the only fact from which their Lordships have to draw their conclusion on the point now under consideration. The letter of the 23rd of *December*, 1846, proves that invoices of the consignments of that year were then sent to the Appellant. All those invoices are not produced; but it is impossible to escape the conclusion that they must have shown in what form the consignments were made; since the losses on the shipments

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to which they relate are unquestionably some of those which the Appellant, on the ground of the improper form of the consignment, is now seeking to throw on the estate of *Hickey, Bailey,* & Co., and he does not pretend that the invoices sent to him were not counterparts of the invoices sent to *England.* Nevertheless, on the receipt of that letter he made no complaint respecting the form of the consignments.

Again, when these transactions were known to have resulted in heavy losses, and he wrote this letter of the 12th of *August,* 1847, his chief complaint was that in the absence of the original account sales, he had not the proper evidence of what had been done with his goods in *England;* and it was not until *October,* 1847, that his present case was distinctly made. The correspondence thus tends strongly to negative the existence of instructions, contract, or understanding inconsistent with the acts of *Hickey, Bailey,* & Co. Their Lordships, therefore, think that the alleged breach of duty on the part of the Factors has not been established, and that as between them and the Appellant he was chargeable with the losses on all the shipments to *England.* The foundation of his case having thus failed, it is unnecessary to inquire whether, if it had been established, he would have been entitled to the particular relief which he claims. Their Lordships, however, observe, that in many important particulars, this case, if the Agent's breach of instructions had been proved, would have been distinguishable from that of *Bertram* v. *Godfray* (1 Knapp's P.C. Cases, 381). There it was proved that the Agents who in breach of their instructions had neglected to

sell when the funds were at 85 per cent., and might have sold at that price; and consequently, the facts both gave the measure of the damages sustained, and afforded the means of compelling the Agents to put their Pprincipal in the position in which he would have stood had they observed his instructions. Here it is quite certain what (if any) proportion of the loss is attributable to the form of the consignment. Nor is it easy to see upon what principle *Hickey, Bailey,* & Co. could be charged with the cost or invoice price of the goods; since it follows from the letter of the 13th of *April,* 1846, both that the Appellant had authorized the shipment of them for sale in *England;* and they must have been sold at a heavy loss, if sold at that time in *Calcutta.*

The next question is, whether the Appellant has been properly charged in account with the re-drafts. It is stated in the judgment of the *Sudder* Court, that no question had been raised regarding the good faith of these entries. They must, therefore, be taken to represent correctly the difference between the net proceeds of the Appellant's goods and the amounts of the Bills drawn against them by *Hickey, Bailey,* & Co. Had *Hickey, Bailey,* & Co. remained solvent and paid the re-drafts, the propriety of these charges against the Appellant could not have been questioned. For he had already received credit in account for the sums for which *Hickey, Bailey* & Co.'s Bills on *London* had been sold; and, therefore, to charge him with the re-drafts was only tantamount to writing back the excess of credit which he had received in anticipation of the realization of the proceeds of his goods. The question raised, however, is, whether *Hickey,*

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Bailey, & Co., having failed, and having presumably paid, at most, a dividend on these re-drafts, they are entitled to charge the whole amount of them against the Appellant. The answer to this question depends on the further question, whether upon or after the insolvency of *Hickey*, *Bailey*, & Co., the consignees in *England* had any right of resort to the Appellant for the recovery of the difference between the sums realized by the sale of the goods, and the amount of their acceptances against them; or the unpaid portion of such deficiency. If they had no such remedy, the Appellant, as the account stands, has received credit for all to which he is entitled, viz., the net proceeds of his goods; whereas, if he were to retain credit for the amounts for which the Bills on *London* were sold, without submitting to be debited with the re-drafts, he would charge the estate of *Hickey*, *Bailey*, & Co. with more than the net proceeds of the goods. On the other hand, if he remained liable to the consignees for the losses on the goods or for any part of such losses, his objection to a mode of stating the amount, which would have the effect of making him pay, or leaving him answerable for such losses, twice over, would be well founded.

It appears to their Lordships that in these transactions there was not that privity of contract between the Appellant and the consignees in *England*, which would render him liable for the sums represented by the re-drafts in question.

This is not the ordinary case of a contract made by an Agent for an undisclosed Principal, on which the contractee on discovering the Principal may at his election sue either Principal or Agent.

The contract on which the liability, in respect of which the re-drafts were drawn, arose, was not a simple consignment of goods for sale by an agent on account of an undisclosed Principal; it was a contract of pledge by Factors having an interest in the goods pledged. *Hickey, Bailey,* & Co., being entrusted with the possession of the goods, and having advanced upon them, drew the Bills on *London* in their own names; they and not the Principal were liable as drawers on those Bills; and they probably sold the Bills with the shipping documents in the market. Had the Bills not been accepted by the consignees, the holders, though pledgees, by means of the Bills of lading, of the goods, could have had no remedy for any deficiency against the Appellant. The acceptance of the Bills by the consignees, and the delivery of the shipping documents to them, made them the pledgees, but did not alter the character of the transaction, which was one whereby *Hickey, Bailey,* & Co. had pledged the goods for the payment of Bills on which they, and not the Appellant, were liable as drawers for an amount exceeding the value of the goods. The re-drafts are for that excess. There seems on such a transaction to be no privity of contract between the consignees and the undisclosed Principal. How can such a privity be imported into it by the fact that, according to the course of dealing between *Hickey, Bailey,* & Co. and the Appellant, the latter received credit on account for the sums for which the Bills on *London* were sold, subject to the final adjustment of the accounts of the different consignments?

Their Lordships are, therefore, of opinion, that the Appellant has been properly charged with the re-drafts.

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We have next to consider the disputed item of Rs. 10,000. In the account, No. 1, the Appellant is credited with this sum under date the 13th of *April*, 1846, as the proceeds of a draft of *Hickey, Bailey*, & Co., on *Gouger* & *Stewart*, of *London*, against sixteen bales of raw silk, shipped on Appellant's account per "*Orient*"; and under date, *March* 18th, he is on the other side of the same account charged with Rs. 541. 12. 6., as commission and shipping charges on the same consignment. It has already been stated that by their letter of the 30th of *October*, 1847, *Hickey, Bailey*, & Co. advised the Appellant that this shipment had been erroneously treated as made on his account; that he had in fact nothing to do with it; and that they had, accordingly, corrected the account by striking out the credit of Rs. 10,000.

It seems that, in the first instance, they omitted to strike out as they ought, on this view of the case, to have done, the charge of Rs. 541. 12. 6.; but this omission was afterwards set right by the Respondent. In the plaint and subsequent proceedings this shipment and the credit attached to it are stated generally and loosely to have been those "of another Merchant;" and the only case thus made by the Appellant on this point, was to the effect that no sufficient reasons had been assigned for withdrawing from the account a sum with which he had been once credited; and that the Respondent's looseness of statement concerning the transactions was an argument for holding that the deduction of the sum in question had been made fraudulently. On the trial in the *Zillah* Court, Mr. *Morinet*, the former book-keeper of *Hickey, Bailey*, & Co., was examined as to this item. His evidence was to this effect,

"The silk did belong to the Defendant originally, but was shipped by *Hickey, Bailey*, & Co., on their own account, they having purchased it, and rendered the account sales to the Defendant." No question was put to him by way of cross-examination on this statement, although he was cross-examined by the Appellant's Agents as to another part of his evidence. The contest in both the Courts below apparently continued to be confined, as before, to the propriety and *bona fides* of the alteration in the accounts. Their Lordships see no grounds for disturbing the conclusion of both the Courts below upon this point. They accept *Morinet's* statements as the true account of the transaction. He was not cross-examined upon it; there seems to have been no suggestion in the Courts below that the Appellant had not received credit for the proceeds of these bales of silk as sold in *Calcutta*. There is an item in the accounts which are in the record which seems to represent those proceeds; and the fact would probably appear even more clearly if we had the Bengalee account made out by the Appellant on the principle asserted by him which was before the Courts below. It is difficult to conceive that he would allow the account to be finally taken against him without seeing that in one way or other every bale of silk which was consigned by him to *Hickey, Bailey*, & Co. was accounted for.

The evidence of *Morinet*, however, suggests another question, which, although it has not been dealt with in the Courts below, their Lordships have been unwilling to exclude from their consideration. That question is, whether the transaction as described by Mr. *Morinet* is not one which the Appellant may impeach as a fraudulent purchase by an Agent on

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his own account of his Principal's goods? In an ordinary case it might fairly be objected that this point was not taken upon the pleadings. The answer to that in the present case is, of course, that the Respondent, by speaking of the transaction as one of "another Merchant," has misled the Defendant, and thrown considerable suspicion on the *bona fides* of his own case. On the other hand, it is to be observed that *Morinet*, if cross-examined, might have cleared up the transaction, and have shown that the purchase by *Hickey, Bailey*, & Co. was known to and sanctioned by the Appellant. Again: it was open to the Appellant, if he were interested in so doing, to raise the point now under consideration in the Indian Courts, where he was represented by an eminent English barrister, to whom the equity on which it is based must be familiar. That he failed to insist on this equity, is a strong argument that it was not for his interest to do so. He could only have set aside this purchase by *Hickey, Bailey*, & Co., on the terms of writing back the sum for which he had received credit as the proceeds of the sale to them, and by taking to the shipment to *England*, with its loss or profit as the case might be. And there seems to be no reason why this particular shipment of sixteen bales should have escaped the common fate which on the evidence we must take to have befallen the other consignments of silk which were shipped from *Calcutta* about that time, and have realized a profit, instead of resulting in heavy loss. It may be added, that the point is not distinctly taken in the Appellant's case. On the whole, their Lordships see no sufficient ground for re-opening this account in respect of the item of Rs. 10,000.

The only remaining question is that of the interest to be allowed. The *Sudder* Court, in the exercise of the discretion given to it by Act, No. XXXII. of 1839, has given interest from the date of the commencement of the suit, at the rate of 12 per centum per annum. There was evidence that the account current between *Hickey*, *Bailey*, & Co. and the Appellant bore interest at the rate of 10 per centum per annum only; and on that ground the *Sudder* Court reduced the interest allowed by the *Zillah* Judge before the commencement of the suit. Their Lordships are of opinion, that the same consideration should have determined the rate of interest to be allowed from the date of suit, and that the amount of this should also be calculated at 10 per centum per annum.

The order, therefore, which their Lordships propose humbly to recommend to Her Majesty as proper to be made on this appeal is, that the interest allowed from the date of suit to the date of payment be reduced by the difference between 12 per centum and 10 per centum per annum, and that in other respects the decree of the *Sudder* Court be affirmed. But having regard to this alteration in the amount decreed, and to the other circumstances of the case, they will also recommend that each party do bear his own costs of this appeal.

MULKAH DO ALUM NOWAB TAJDAR BOHOO . . . . . } *Appellant,*

AND

MIRZA JEHAN KUDR, NOWAB MIRZA, ZUMAN ARA BEGUM and RUFAATOONISSA BEGUM . . . . . } *Respondents.**

On appeal from the Court of the Judicial Commissioner of Oude.

3rd & 4th March, 1865.

Lex loci of the Province of *Oude.*

The principles of law, as well as the rules of procedure of the *Punjab* Code of 1854, were introduced into *Oude* in 1856, on its annexation to the British Crown, to be adopted as the basis of the administration of the law in that Province, and to be applied so far as they appeared to the Judicial Commissioners appointed for the administration of justice there, not to be unsuited to the circumstances of the country, except so far as they were founded upon local custom, varying the general law, whether Hindoo or Mahomedan, when the Code was not to be applied to *Oude.*

The *Punjab* Code of 1854, cl. 10, sec. VI., declares that:—"By the Hindoo and Mahomedan law, the dower of a married woman, if not

THIS appeal was brought from three several Orders or decrees of the Deputy Commissioner of the *Lucknow* Civil Court, and the Judicial Commissioner of *Oude* disallowing a claim of the Appellant for payment of dower amounting to a crore of rupees out of the estate of her deceased husband, and directing the estate to be divided in certain shares amongst the Appellant and Respondents.

* Present:—Members of the *Judicial Committee*—The Right Hon. the Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors:—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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The Appellant was the widow of *Mirza Secunder Hushmut*, a brother of the late King of *Oude*, and formerly a General in his service. The Respondent, *Mirza Jehan Kudr*, was the son, the Respondent, *Nowab Mirza*, an adopted son, and the Respondents, *Zuman Ara Begum* and *Rufaatoonissa Begum*, the daughters of the deceased. The late Royal family of *Oude*, and the parties to this appeal, were Mahomedans.

On the dethronement of the King of *Oude*, his brother, the late General *Mirza Secunder Hushmut*, proceeded to *England*, where he afterwards died, leaving the Appellant and Respondents surviving

entirely paid up at the time of marriage, is claimable by her at any subsequent time, and especially in the event of a divorce. Among Mahomedans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay. Such contract, if enforced by a Court, would ruin a Defendant who has divorced his wife, without reflecting on the liability to which he was subject. Still, although the full amount need not be decreed, yet, in the event of a divorce without a valid cause, heavy damages will be awarded to the wife in proportion to the means of the husband:" and the 11th section declares, that in the event of the husband's death "the dower is treated as a debt, and takes precedence of the claims of heirs, but not of other debts; it stands on the same footing with them. In this case, the Court would possess the modifying power of clause (10), and award to the widow a fair sum, with reference to the assets of the estate and the circumstances of the heirs."

A Mahomedan of the *Soonee* sect, domiciled in *Oude*, and a member of the Royal family there, on his marriage, by a deed executed in the year 1838, settled a crore of rupees by way of dower. This dower was not demanded during the lifetime of the husband, but at his death, which event took place after the annexation of *Oude*, in 1856, the widow claimed the whole amount, although it would exhaust the entire property of the settlor, and totally exclude his heirs from succeeding to any part of his estate. The Judicial Commissioners of *Oude* applied the provisions of the *Punjab* Code to the case; and held, that according to that Code the deed was to be construed to mean, not the absolute sum settled for dower, which was from the position of the settlor an extravagant dowry, but an adequate provision for the wife; and directed the estate of the husband to be divided in moieties between the widow and the husband's heirs. Upon appeal, such decision affirmed by the Judicial Committee, who held,

First, that the Commissioners were right in applying the *Punjab* Code to the case; and

Secondly, that the Commissioners, under that Code, properly exercised their discretion in making an equitable division of the estate of the husband between the widow and the heirs.

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him. The deceased General was at the time of his death entitled to immovable property situate in *Oude*, and to promissory notes of the Government of *India* for Rs. 120,000, and other movable property to a large amount.

When he proceeded to *England*, the Respondents, *Mirza Jehan Kudr* and *Nowab Mirza*, minors, were left at *Lucknow* in the care of General *Outram*, then in charge of the Province of *Oude*.

On the death of their father, they applied to the Judicial Commissioner of *Oude* for a division of the property of the deceased General, and for the relinquishment to them of the immovable property of the deceased, alleged to be in the possession of the Appellant. The Judicial Commissioner remitted the case to Mr. *Perkins*, the Assistant-Commissioner at *Lucknow*, to institute inquiries on the subject.

After a preliminary inquiry, the Assistant-Commissioner, being of opinion that the legitimacy of the Respondent, *Mirza Jehan Kudr*, was in dispute, referred him to his remedy by a civil suit; but on appeal to the Judicial Commissioner that Officer directed the case to be reported to himself.

On the 22nd of *November*, the case was brought efore the Commissioner's Deputy for trial, when arbitrators and an umpire were appointed by the parties to dispose of the case.

The arbitrators and umpire having been directed by the Deputy Commissioner to send their opinions separately, the Appellant's arbitrator, on the 11th of *December*, 1858, forwarded his Award, which was as follows:—"It is evident from the proceedings that the dispute is regarding notes valued Rs. 230,000 belonging to General *Sahib*, jewels

valued at about 5 lacs, and landed property also valued about 5 lacs. The remaining property is in *London*. Now, the *Mooktar* of the Defendant states that of the above-mentioned notes, the General gave notes valued Rs. 110,000, which are deposited in the Treasury to *Tajdar Bohoo* (the Appellant). Of the other notes the *Mooktar* declared his ignorance; while the *Mooktars* of the Plaintiffs state that the remaining notes claimed are deposited in the Government Treasury. But the *Mooktars* give no detail of the jewels, and say that the Plaintiffs being minors know nothing about them; neither do they produce any satisfactory evidence. No one can part with the landed and immovable property, which has been saved from demolition. The other claims against each other deserve no consideration, because the *Mooktar* of *Mulkah Do Alum Nowab Tajdar Bohoo*, disputes the legitimate descent of the son of the deceased General. But *Meer Wajid Ali*, Trustee of *Mirza Jehan Kudr* and others, produced copy of an Order (the original of which is alleged to have been filed in the Judicial Commissioner's Office), addressed by *Wajid Ali Shah* to *Mirza Jehan Kudr*, in proof of the legitimacy of *Mirza Jehan Kudr*, and a letter from *Mahomed Mirza*, who accompanied General *Sahib* to *London*. *Meer Wajid Ali* then deposed, that in his journey to *London*, General *Sahib* had by his slave girl, *Ameer Buksh*, two daughters, of whom one is dead, but the other is still alive. But these points have not been established under the Mahomedan law; while the objections urged by the *Mooktar* of *Mulkah Do Alum Nowab Tajdar Bohoo*, being unsupported by any evidence of refusal from the General, deserve no consideration. In like manner,

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the statement which *Meer Wajid Ali* makes, that *Mulkah Do Alum Nowab Tajdar Bohoo* had given up her claim to the dower, and to prove which statement he has produced a *muhzur* or document signed by the *Begums* or wives of the King, is contradicted by the *Mooktar* of *Nowab Tajdar Bohoo* on the ground of their being subject to the orders of *Meer Wajid Ali*. Now, I also do not consider that statement of *Meer Wajid Ali* as deserving of credit, because *Mulkah Do Alum Nowab Tajdar Bohoo* has still in her possession the dower deed for one crore of rupees, attested by the *Moojtuhids* and the relations of General *Sahib*. Had *Nowab Tajdar Bohoo*, after she had lived together with her husband for a long time, relinquished her claim at the time of her husband's departure to *Calcutta*, the respectable citizens of *Lucknow* (as there was no interdiction with regard to its publicity) would have been acquainted with it, especially those who had attested the deed of dower, and then the objections urged by the *Mooktar* of *Mulkah Do Alum Nowab Tajdar Bohoo* would have been useless. Under these circumstances I find it difficult to decide the case under the Mahomedan law; and, concurring with *Mooeenood-dowlah Bahadoor*, I consider it expedient to make some provision for the children of General *Sahib*, both those who are in *Lucknow* and those who are in *London*, or some other place; I, therefore, adjudge that the notes for Rs. 110,000, which, as alleged by the *Mooktar* of the Defendant, were given to her by the General when he was about to set out for *Calcutta*, and which are deposited in the Government Treasury, should entirely be made over to the Defendant; that the remaining notes, valued Rs. 120,000, claimed by

the Plaintiffs, be made over to them as traced out by them; that the landed property situated in *Lucknow*, and the goods which may be received from *London*, be equally divided among the children of General *Sahib* and *Nowab Tajdar Bohoo;* that in future neither party may bring forward any claim against the other; and that with the view of preventing dispute in future, Government should bind both parties by an agreement that neither party may molest the other."

The Umpire also forwarded his decision in accordance with the Award of the Appellant's Arbitrator, as did the Arbitrator for the two Respondents.

On the 26th of *January*, 1859, the Awards were taken into consideration by the Assistant-Commissioner, when he recorded his concurrence in the opinion of the Arbitrators and Umpire, but as they had not given a detail of the shares of the parties in the estate of the deceased General, he directed the Arbitrators to specify the shares of the several claimants.

The Umpire reported on the 31st of *January*, 1859, as follows:—"That of the notes for Rs. 120,000 allotted to the Plaintiffs, one third, or Rs. 40,000, should be given to the minor daughter, which would suffice for the maintenance of her mother and her marriage expenses; the remaining two thirds, or Rs. 80,000, should be made over to the *Mirza Jehan Kudr*. As *Nowab Mirza* is not descended from the General, and is only an adopted son, he can claim no share under the Mahomedan law. But the General had a great regard for his maintenance and education, and beside this, *Nowab Mirza* is extremely poor. I would, therefore, allot to him one eighth, or Rs. 10,000, out of the two thirds, or Rs. 80,000. I would like-

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wise propose, that until the Plaintiffs attain to the age of majority, all the money should remain in deposit in the Government Treasury and payments should be made to them for their daily expenses as required. Of the landed property, the garden of *Dwarka Dass* cannot be divided; but I would suggest that it should be given out in farm, and the proceeds divided equally between *Nowab Tajdar Bohoo* and the descendants of General *Sahib*. The remaining houses, which may be released by Government, should be estimated by an Officer appointed by the Court, and divided equally."

The two first Respondents were satisfied with the Award, but the Appellant objected on the grounds, amongst others, that it was not proved that the Respondent, *Mirza Jehan Kudr*, was the legitimate son of the deceased General; that her claim for dower should be satisfied in the first instance; and that she should be allowed to retain possession of the whole of the deceased's estate to satisfy her dower, which estate was less than the amount settled by the deed of dower.

On the 7th of *February*, 1859, the Assistant-Commissioner finally adopted the Award, and directed a certificate of administration to issue in favour of the two Respondents, and the Deputy-Commissioner concurred in this decision.

From these proceedings the Appellant preferred an appeal to the Commissioner, who after hearing the case dismissed the appeal, and directed the Orders of the Assistant-Commissioner and the Deputy-Commissioner to be upheld, but reserved to the Appellant liberty to institute a suit to establish her claim.

Accordingly, on the 8th of *April*, 1859, the Appellant filed a regular suit, and by her plaint claimed

one crore of rupees on account of her dower, for which she submitted that the whole of her late husband's estate was liable.

The Respondents, *Mirza Jehan Kudr* and *Nowab Mirza*, were made Defendants, and by their answer alleged, that the case had been disposed of by arbitration, and that the Award was a bar to the suit, in which the claim for dower was not proved, for when the deceased General was going to *England*, the Appellant relinquished her claim to dower before witnesses, but that a deed of relinquishment could not be executed at that time; that the Respondent, *Mirza Jehan Kudr*, was the son of the General, and the Respondent, *Nowab Mirza*, an adopted son; that the mother of *Mirza Jehan Kudr*, was *Nowab Hushmut Muhil Sahiba*, whose claim to her dower was for fifty lacs of rupees, besides her claim to jewels and ornaments valued at Rs. 500,000, which the General, when going to *London*, left in charge of the Appellant.

The Appellant's deed of dower was filed, by which a crore of rupees of the current coin of *Lucknow* was fixed as the dower.

The Respondents then filed a petition, stating that the deed of dower was not genuine, but a forged one, and could not, under the Mahomedan law and usage of the country, be considered a trustworthy document.

Evidence was taken respecting the execution of the deed of dower and the right of the Appellant to have her dower satisfied in priority to any claim of inheritance. It was proved that the Respondent, *Mirza Jehan Kudr*, was the son, and the Respondent, *Nowab Mirza* the adopted son, and the other Respon-

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dents the daughters of the deceased General, *Mirza Secunder Hushmut*, and that the Appellant had not relinquished any claim to dower, and the opinion of the Mahomedan law officers and the *Mujtahid*, or Chief Priest, was taken as to the question of dower.

The case was heard on the 25th of *August*, 1859, before the Deputy-Commissioner *Carnègy* and the Assistant-Commissioner *Elliott*, in the *Lucknow* District Court, when those Judicial Officers decided that the Appellant as the widow, and the Respondent, *Mirza Jehan Kudr* as the son, and *Zuman Ara Begum* and *Rufaatoonissa Begum* as the daughters of the deceased General, were the heirs of his estate, and that the Respondent, *Nowab Mirza*, as the adopted son of the deceased, should be recommended for a pension. That the special claims of the Respondents should be disallowed; that the deed of dowry was genuine; that the dowry was to be considered as a debt, and took precedence of claims of inheritance; but that by the *Punjab* Code the Court was at liberty to give instead of the dowry, a sum proportioned to the estate, and that after setting apart a sum sufficient for the maintenance of the other heirs, the remainder of the property should be given to the Appellant in lieu of her dowry. The Court cancelled the Order of the Summary Court, and allotted a monthly pension of Rs. 400 to the Respondent, *Mirza Jehan Kudr*, of Rs. 150 to each of the Respondents, *Zuman Ara Begum* and *Roofaatoonissa Begum*, and Rs. 40 to the other Respondent, *Nowab Mirza*.

The Appellant appealed from this decree to the Commissioner and Superintendent of *Lucknow*, objecting thereto, on the ground that the case had not been decided as regarded her claim to dower in accord-

ance with Mahomedan law, and insisted that she was entitled to the whole estate of her deceased husband in satisfaction of her dower, and that the Respondents were not his lawful children.

Further inquiries were instituted by Mr. *Campbell*, the Judicial Commissioner of *Oude*, and questions put to the Registrars of the *Sudder Dewanny* Courts of the *Punjab*, and at *Agra*, *Calcutta*, *Madras* and *Bombay*, to ascertain the practice of those Courts in dealing with claims for dower, requesting that the Judges of those Courts would inform him, whether a Mahomedan deed of dower assigning to the wife an exorbitant sum far beyond the husband's means (the money not being paid or vested), was to be construed literally, or held liable to modification under an equitable construction . . . . whether it had been settled that dowers of different wives come upon the estate in order of date, one taking precedence of the other, or *pari passu*; and whether they precede, rank with, or follow *bonâ fide* debts for consideration as against the assets of an estate. The replies to those questions showed that much doubt and uncertainty prevailed on the subject.

The Commissioner and Superintendent of the *Lucknow* division, Mr. *S. A. Abbott*, on the 2nd of *December*, 1859, delivered judgment. The material part of which was in these terms: — "The *Futwa* has been received from *Calcutta*, and there can be no doubt but that in point of Mahomedan law, the Appellant is entitled to the whole estate within the stipulated amount of her dower. I regard these dowers as a very great evil. There is no doubt that large sums are specified in these dower deeds, with a view to preventing separation on trivial occasions.

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Large sums are in these dowers specified which have no existence; no deposits are made or Trustees appointed; they are generally merely a wife's security for the good behaviour of her husband. By the Mahomedan law, however, there can be no doubt but that they take precedence of all claims of heirs, and must be satisfied before any claims of the sort can be admitted, They rank with debts, and would be paid in proportion to assets available. The *Punjab* Code makes a deviation from this, and leaves it in equity and justice to make some provision for the heirs. This is undoubtedly a most humane and just provision. It is also supported by a case which occurred in *Lucknow*, and we may fully assume it to be a *lex loci*, for there is the very best authority for it in the decision of the *Mijtehudoolussur* in the case of *Murriamoolnissa* v. *Ruheemolnissa Ameer Begum Shumsoolnissa, Inyeut-olla*, and *Tuffal Alle*, before Mr. *Martin*, Deputy-Commissioner, on the 14th of *April*, 1857, in which this High priest decided that a brother of deceased should get one-fifth share in the estate before satisfying the dower. In *Oude* we are not bound to law, but to equity and justice; and I think the arrangement proposed by the Deputy-Commissioner for providing for the members of this family is most just and reasonable. I consequently dismiss the appeal, with costs, and uphold the order of the Lower Court."

From this decree the Appellant appealed to the Judicial Commissioner of *Oude*. On the 23rd of *March*, 1860, the Judicial Commissioner, Mr. *G. Campbell*, decided that after the debts due from the deceased General were discharged out of his estate, the remainder of his estate should be divided, and he apportioned one moiety to the Appellant as her

absolute property in respect of her dower under the deed, and the other half to his heirs, the Respondents.

The Appellant applied to the Judicial Commissioner for a review of this judgment, and the Respondent, *Mirza Jehan Kudr*, put in an answer to her application, asserting that the judgment of the Judicial Commissioner ought to be sustained, as it was in accordance with the award of the Arbitrators, and further that the Court was not bound to give effect to the deed of dower. On the 28th of *May*, 1860, Mr. *E. C. Bailey*, Officiating Judicial Commissioner, rejected the application for review.

The Appellant then presented a petition to the Judicial Commissioner of *Oude* for leave to appeal to Her Majesty in Council, but the Judicial Commissioner being of opinion that he had no power to admit an appeal to Her Majesty in Council (*a*), an application was made to Her Majesty in Council to admit this appeal, and the same was granted.

The appeal now came on for hearing.

The Attorney-General (Sir *R. Palmer*,) and Mr. *Leith*, for the Appellant.

This case is one of the greatest importance to the whole of the Mahomedan population in *Oude*. It involves the question whether the *lex loci* of *Oude*, the Mahomedan law, is to be superseded by the introduction of the *Punjab* Code, as between Mahomedan subjects, by determining their rights, at the option or discretion of the Judge of a fanciful equity of his own, instead of the known and admitted rule and principles of Mahomedan law.

(*a*) See 8 Moore's Ind. App. Cases, p. 274, and Salik Ram. *v.* Azim Ali Beg. *ib.* 270.

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Our contention is, that the Kingdom of *Oude* being a Mahomedan country, and the Mahomedan law the *lex loci* at the time when it was annexed to the British dominions, the Judicial Officers appointed ought to have administered that law, and that the Government had no power to import into *Oude* a Code made for another Province in which the Mahomedan law is not in force, until such law was formally abrogated, and some other law substituted by competent authority. Now, it appears that the Governor-General of *India* in Council, on the annexation of *Oude*, and the establishment of Courts of Justice to be presided over by Judicial Officers, declared by a State Paper to Major-General *Outram*, dated the 4th of *February*, 1856, par. 45 (*a*), to the effect, that the *lex loci* of that Province should be observed and administered in such Courts; but such law, which was the Mahomedan law, was not applied in this case, although the parties were Mahomedans. The *Kabeenamah*, or deed of dower, sued on by the Appellant, was made in consideration of marriage while *Oude* was still a Mahomedan Kingdom; and so, even if, after the annexation by the British Crown, a new law had been introduced by competent authority, and substituted for the *lex loci*, which we submit it was not, it would have been unjust to the Appellant to give a retrospective effect to such new law, so as to deprive her of her rights as a Mahomedan widow, or so as to alter or limit the effect and operation of the deed under the *lex loci*, or Mahomedan law.

The opinions of the Judges at *Agra* and elsewhere, or other Officers in the *Punjab*, or any rule in the Code of that Province opposed to the

(*a*) Parl Pap. relating to Oude, 1856, p. 267.

rules or principles of Mahomedan law, ought not to have any weight, and should not have influenced the decisions of the Judicial Officers in *Oude* in administering the law of that country, in a case like the present, where the parties were domiciled Mahomedans of that Province. Indeed, it was clearly established by the *futwas* of learned Mahomedan lawyers, and in fact acknowledged by the decrees appealed from, that the right of a Mahomedan wife to *deen mohur*, secured to her by deed on the celebration of her marriage, is declared by Mahomedan law to be paramount to the claims of the heirs of the husband, and equal to the rights of his creditors. Considering the high rank of the bridegroom, a member of the Royal family of *Oude*, and heir apparent to the Throne, the amount of dower, a crore of rupees, was not excessive. *Macnaghten's* "Prin. & Prec. of Moohummudan Law," pp. 287, 291; *Ameer-oon Nissa* v. *Moorad-oon Nissa* (*a*). *Gholam Husun Ali* v. *Zeinub Beebee* (*b*); *Mussummaut Banoo Beebee* v. *Fukheroodeen Hosein* (*c*); *Sahib Jan Khatoon* v. *Dianut Beebee* (*d*); *Ranee Buksh Beebee* v. *Nadir Beebee* (*e*); *Mussumat Hooséinee Begum* v. *Mussumat Oomdah Begum* (*f*); and, therefore, the *Kebunamah* of the Appellant ought to have been given effect to on the death of her husband, and enforced with respect of the whole amount of dower thereby secured against his estate, to the exclusion of the Respondents, even if they had proved themselves his heirs.

But another fatal objection exists; the Respondents utterly failed to prove their relationship to the deceased husband of the Appellant, as heirs according to Maho-

(*a*) 6 Moore's Ind. App. Cases, 211. (*b*) 1 Ben. S. D. A. Rep. 48.
(*c*) 2 Ben. Sud. Dew. Rep. 180. (*d*) 3 Ben. S. D. A. Rep. 12.
(*e*) 3 Ben. S. D. A. Rep. 61. (*f*) 3. S. D. A. Rep. N. W. P. 52.

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medan law; neither was it proved that there was any other heir of the deceased except the Appellant as widow; and she was, therefore, under her deed of dower, and as heir, entitled to the whole estate of the deceased, subject only to the payment of creditors, if any.

Mr. *Forsyth*, Q.C., and Mr. *Ayrton*, for the Respondents.

It cannot be disputed that the late kingdom of *Oude* is a conquered country. It was occupied by the British army, and by Proclamation declared vested in the British Crown, which constituted a complete act of sovereignty. Parl. Papers relating to *Oude*, 1856, pp. 237, 255, 291. That being so, it is a cardinal principle of the law of nations, that the conquering power has a perfect right to alter the law of the conquered country. [The Lord Justice *Turner*: The old law remains in force till altered.] Yes. Here the Government of *India* in the Despatch of the 4th of *February*, 1856, par. 45, exercised the power of Conquerors in extending to *Oude* the provisions of the *Punjab* Code. Parl. papers relating to *Oude*, p. 267, and directed that the law to be administered by the Judicial Officers in *Oude* should be the *Punjab* Code of 1854, except in certain cases of local usage. That Code has been acted upon in other cases in regarding questions of Mahomedan law.

By the *Punjab* Code of 1854, cl. 10, sec. 6, it is enacted, that as by the Hindoo law the dower of a married woman, if not entirely paid up at the time of marriage, is claimable by her at any subsequent time; among Mahomedans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay, that as such contract if enforced

by a Court would ruin a Defendant, damages should be awarded to the wife in proportion to the means of the husband; and by sec. 11 of the same Code, in the event of the husband's death, the dower is to be treated as a debt, and take precedence of heirs, but not of other debts, and referring to the modifying powers of cl. 10, the Court is directed to award the widow a fair sum in reference to the assets of the estate and the circumstances of the heirs. Now, in no sense can the introduction of this Code affect this case, as this Code is similar to the Mahomedan law which prevailed in the Kingdom of *Oude* at the time of its annexation. According to the custom of Mahomedans in *India*, deeds like that under which the Appellant claimed are only nominal and illusory, and never intended to be enforced. Dower by the Mahomedan law is given as a safeguard to prevent a husband from capriciously divorcing his wife. Here the husband was a minor, and there are no Trustees to the deed as in an English marriage settlement. We admit it may be enforced after the husband's death, but the Court, having regard to the circumstances of the husband's estate, would only decree, what in equity would be a fair and reasonable sum; *Omduton Nisa Begum* v. *Mirza Agud Ali* (*a*); *Macnaghten's* "Princ. & Prec. of Moohummudan Law," p. 274. If the Appellant's argument is carried out, a husband could so endow his wife as to defeat his creditors and his heirs. Here the sum settled, a crore of rupees, is beyond the means of the settler, and whether governed by the Mahomedan law or the *Punjab* Code, such a dower could not be enforced to the full amount.

The Respondents are the heirs of the deceased, and

(*a*) 1 Ben. S.D. A. Rep. 276.

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entitled by law and equity to the share of his estate allotted to them by the decree of the Judicial Commissioner.

Their Lordships' judgment was delivered by

The Right Hon. LORD KINGSDOWN:

29th March 1865.

This is an appeal by the widow of the late General *Sahib* against certain decisions which have been pronounced by the Judicial Commissioners in *Oude* on a claim preferred by her for dower against the estate of her late husband.

The marriage took place about the year 1838 of our era, and by the settlement made upon it, to which the father of the bridegroom was a party, the wife's dower was fixed at a crore of rupees, a sum equal to £1,000,000 sterling.

The father of the bridegroom was a son of the King of *Oude*, and at that time heir-apparent to the Throne.

General *Sahib* came over to England after the overthrow of the *Oude* dynasty, and died here.

The Royal family of *Oude* were all Mahomedans.

The General left a son, an adopted son, and two daughters surviving him. These persons claimed to be coheirs with his widow to his property.

The widow claimed a right to have the whole amount secured by the deed as her dower treated as a debt due from her husband's estate, and paid *pari passu* with the debts of other creditors, and she disputed the title of the other claimants as coheirs.

After some attempts to settle the matter by arbitration, which proved abortive, a suit was instituted, in order to determine the rights of the parties.

In the course of these proceedings an inquiry was directed with respect to the property which the General

had left at his death, and in the result it appeared that it amounted in all to about five lacs of rupees. The claim of the Appellant alone in respect of her dower amounted to a crore, or 100 lacs, exclusive of other debts, which are represented to be of very trifling amount.

The effect, therefore, of allowing the Appellant's claim would be, to a great extent, to defeat the claims of the other creditors, and to sweep away the whole property from the heirs.

If such, however, be her legal rights, no Court of Justice can refuse to give effect to them on the ground of any inconvenience or hardship which may result from allowing them.

The case came first before two Assistant Commissioners in the *Lucknow* District Court in *August*, 1859; then on appeal before Colonel *Abbott*, the Commissioner Superintendent of the *Lucknow* division, on the 2nd of *December*, 1859; and lastly, before Mr. *Campbell*, the Judicial Commissioner of *Oude*, on the 23rd of *March*, 1860. All these gentlemen were of opinion, that the claim of the Appellant could not be allowed to its full extent, but must be modified with reference to the assets of the husband and the circumstances of his family; but they differed in some degree as to the mode in which, in the exercise of their discretion, the division between the widow and the other heirs should be made. By the last order, that of Mr. *Campbell*, made on the 23rd of *March*, 1860, it was directed that the debts of the General should be first paid; that one-half of the remaining property should be paid to the widow, and the other half to the other heirs; but this decision was not to affect a sum of Rs. 110,000 in Com-

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pany's paper in the name of the Appellant, which was to be retained by her, as her absolute property. From this and the preceding orders the present appeal has been brought.

Great trouble appears to have been taken by the Commissioners to ascertain the general Mahomedan law upon the subject, and opinions were obtained from the Courts of the several Provinces of *India*, particularly with reference to the question whether, when extravagant sums far beyond the means of the bridegroom to satisfy were provided by settlement as dower, such sums were to be treated as *bonâ fide* debts to be paid *pari passu* with other debts on the death of the husband, though they might sweep away the whole property from the heirs, or whether they were to be treated as securities for an adequate provision for the wife. The reports from the different Provinces were not uniform—some being in favour of treating the sum fixed as an absolute debt; others in favour of a modification of the demand with reference to what might be considered the proper dower of the wife.

It is not necessary, in the opinion of their Lordships, to decide the general question, because, whatever the general law may be, the mode in which contracts of this description are to be treated in *Oude* has been settled by specific Regulations issued by competent authority, in the manner which we are about to state.

We take the facts as to the origin of these Regulations from a letter dated the 4th of *February*, 1856, from the Secretary-General of the Indian Government, containing instructions for the Government of *Oude*, addressed to Major-General *Outram*, who was appointed Chief Commissioner of the affairs of this Province.

The facts as appearing in this letter are these: in the year 1847–8 a few rules for Civil judicature were drawn out by the Indian Government for the guidance of the officers employed in the Cis-and-Trans-*Sutlej* States. Then these were in 1849 extended to the *Punjab*, and it was left to the Officers charged with the local administration, laying upon these the foundation of the judicial system, to improve, amend, and elaborate them as practical experience might suggest.

These rules thus amended were in 1854 reduced into a printed form, and circulated amongst the Judges of the *Punjab*. They are entitled "Abstract Principles of Law, circulated for the guidance of Officers employed in the Administration of Civil Justice in the *Punjab*." To which is appended a proposed form of procedure.

This Code, as its title imports, contains a statement, first, of the principles of law to be adopted by the Judges; and second, of the rules of procedure to be followed. It lays down the ordinary rules of Mahomedan and Hindoo law on the principal subjects which were likely to come before the Courts, and both in the rules of law and forms of procedure, introduces some alterations into the laws prevailing in the older Provinces.

This Code thus introduced into the *Punjab* had, in the opinion of the Government, been found to work well.

In *February*, 1856, the King of *Oude* was deposed by the Indian Government, and the whole administration, civil and military, of the Kingdom was assumed by its officers under its authority. To provide for the administration of justice a number of Commissioners and Assistant Commissioners were appointed to act for different Districts into which the

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country was to be divided, and the general rules to be observed in the administration of justice, as well as in the ordering of the Province in other respects, are laid down in the letter to which we have referred.

The intention to assimilate, as far as possible, the Government of *Oude* to that of the *Punjab* appears in several passages of the letter. In paragraph 21 it is said,—"It has been already intimated to you that the administration of *Oude* is to be conducted as nearly as possible in conformity with the system which has been introduced into the *Punjab*."

After explaining the advantages which had arisen in that Province from the introduction of the new Code, and observing that the Kingdom of *Oude* resembled very closely in its population, language, creeds, and customs the North-West Provinces, the letter proceeds, "There is, therefore, every reason to believe, and none to doubt, that the system of administration as modified for the *Punjab*, and divested of all those forms and technicalities which delay justice and are specially distasteful to a people unaccustomed to technical litigation, will be acceptable to the people of *Oude*, and more completely suited to the Province itself than it was to the *Punjab*, where, nevertheless, its success is undeniable."

After dealing with financial and some other matters, the letter, in paragraph 43, proceeds to give instructions for the administration of civil justice, with respect to which, it observes that very material assistance is derived from the results of experience acquired in the *Punjab*.

Then follow the paragraphs on which the question as to the introduction of these rules into *Oude*, mainly depends.

The 44th section, after giving the history of those rules which we have already read, proceeds thus:—"These rules now, for the most part, guide the proceedings of the Judicial Courts in the *Punjab*, and they have been found so well fitted to the requirements of a new Province and a simple people, so easy in their application, so acceptable to the population, no less than to the officers themselves, and so beneficial in their results, that the Governor-General in Council advises that they should be made the groundwork of the civil judicial system in *Oude*. Several printed copies of these 'Rules' will shortly be furnished to you for distribution.

"45. There appears to be no reason whatever for supposing that the Rules of procedure will not be as applicable to the Civil Courts in *Oude* as to those in the *Punjab*, and there can be no objection to their immediate introduction. It is believed also the 'Principles of Law' will be found sufficient, in the first instance, to guide the Judicial Officers in dealing with the various questions which will come before them in this branch of their duty. But it will not escape your observation that, in the preparation of the rules under notice, much attention has been given to the *lex loci*, and that, especially in matters relating to inheritance, marriage, divorce, and adultery, adoption, Wills, legacies, and partition, as well as in all commercial transactions, a due regard to local usage has been enjoined. It cannot, of course, be supposed that the *lex loci*, or local custom, in Provinces differing so widely as the *Punjab* and *Oude* is in all, or even in many, respects identical, and it follows that those provisions of the 'Rules' which rest on

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the *lex loci* in the *Punjab* cannot, with any propriety or without risk of injurious failure, be extended to the Province of *Oude*."

It appears to their Lordships that the effect of these clauses is, that the principles of law as well as the rules of procedure laid down in the *Punjab* Code are to be adopted as the basis of the administration of justice in *Oude*, and to be applied as far as they may appear to the Commissioners to be not unsuited to the circumstances of the country; but that, as far as they are founded upon local customs, varying the general law, whether Hindoo or Mahomedan, they are not to be applied to *Oude*, where the local customs would probably differ from those of the *Punjab*.

The 46th section is in these words :—" While, then, the Governor-General in Council directs your attention to this collection of principles of law, as calculated to afford material assistance in the absence of any better or more appropriate Treatise, he refrains from requiring the strict observance of them, until it can be ascertained how far they are applicable to the peculiarities of the Province and the customs of its people. With this end in view, his Lordship in Council desires me to suggest that all the Commissioners and District Officers, and the most experienced of the Assistants, should be required to study the 'Principles of Law' in their daily application to the business brought before the Civil Courts, and, after the lapse of a twelvemonth or more, as may be hereafter determined, to report to the Judicial Commissioner the opinions which they may have formed of the applicability of the 'Rules of Law' to the

people of *Oude*, and to offer, at the same time, any remarks and suggestions which may have occurred to them. It may, perhaps, be advisable also to invite the opinions and observations of a few of the Native Extra Assistants, whose past career and official knowledge, and more immediate contact with the people, may have qualified them to form a judgment on those points which touch upon native customs, and to give sound advice. On receipt of all these reports, it will be the duty of the Judicial Commissioner to study the suggestions which they contain, and to recast the collection of Rules of law. It is not anticipated that the Rules of procedure will call for much, if any, alteration, but it will rest with the Judicial Commissioner to give his consideration to these also at the same time, and to introduce such modifications as may appear advisable, provided they do not tend to introduce those complications and technicalities, the removal of which is the main as it is the most acceptable feature of the system successfully followed in the *Punjab*."

This section is perfectly consistent with those which precede, and shows that the rules were to be generally acted upon, though strict obedience to them was not required, until it had been ascertained how far they were applicable to the peculiarities of the Province and the customs of its people. With this view, its application is to be carefully watched by those who administer it, who, after a certain period, are to make a report upon the subject, with any suggestions which may occur to them for amending it.

The Indian mutiny which broke out in the following year probably prevented any report being made by the Commissioner, in compliance with the

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directions of the 46th section, as early as was there contemplated; but, after the restoration of the British authority, we find in the official report of the administration of the Province of *Oude* for the year 1859–60, that the *Punjab* Code is stated to be the basis of the Civil Law of the country, and allusion is made to some modifications which have been introduced in it, but it does not appear that any such modification related to the subject now in controversy.

On the whole, their Lordships entertain no doubt that the Articles of the *Punjab* Code generally were in force at the time of the date of these Orders, the first of which was made on the 25th of *August*, 1859, and the last on the 23rd of *March*, 1860.

Then on what grounds is the application of these rules to be excluded from the present case? If they are to be excluded, it must be on the ground that there is some *lex loci*, or special custom, in *Oude* by which the law of dower in that country differs from the general Mahomedan law. But no such custom is pretended. The argument for the Appellant rests entirely on the general Mahomedan law.

The next question is, do the rules of the *Punjab* Code warrant a departure from the strict law, if law it be, by which in all cases a sum fixed as dower is to be enforced as an absolute debt? Upon this question no doubt can be entertained. They provide for a modification of the dower mentioned in a marriage-contract both in the case of a divorce and of the death of the husband.

The 10th clause, section VI., is in these words:— "By the Hindoo and Mahomedan law, the dower of a married woman, if not entirely paid up at the time of marriage, is claimable by her at any subse-

quent time, and especially in the event of a divorce. Among Mahomedans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay. Such contract, if enforced by a Court, would ruin a Defendant who had divorced his wife without reflecting on the liability to which he was subject. Still, although the full amount need not be decreed, yet, in the event of a divorce without a valid cause, heavy damages will be awarded to the wife in proportion to the means of the husband."

The 11th section provides for the event of the husband's death:—"At the husband's death, the dower is treated as a debt, and takes precedence of the claims of heirs, but not of other debts; it stands on the same footing with them. In this case, the Court would possess the modifying power of Clause 8, and award to the widow a fair sum, with reference to the assets of the estate and the circumstances of the heirs." The reference to clause 8 is either a mistake or a misprint for clause 10.

It appears by the proceedings in this case, that these rules have been and are acted upon in the *Punjab* in dealing with cases of dower, and, by the orders to which we have referred, they have been extended to *Oude*.

It was suggested that this was only to apply to future contracts, and not to contracts previously made. But their Lordships think it clear, that these sections provide for the mode in which all contracts of this description which might come before the Courts were to be treated. Upon the whole, their Lordships are of opinion, that the Commissioners were bound to apply the provisions of this Code to the case before

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them, and were at liberty to exercise a discretion in the division of the property in dispute between the widow and the heirs. As to the manner in which that discretion should be exercised, the Commissioner whose judgment is appealed from must be more capable of forming a correct judgment than their Lordships can be.

It may be proper to notice an objection which was taken, that in one of the Orders appealed from, a provision was made out of the estate for an adopted son, though it was admitted by the Commissioner making the Order, that such son was not properly one of the heirs. But this will be corrected by the decision of Mr. *Campbell*, which directs the division to be amongst the coheirs other than the Appellant; and at all events, it is a matter which relates to a fund in which she has no interest.

Their Lordships will humbly advise Her Majesty to affirm the Order of Mr. *Campbell* of the 23rd of *March*, 1860; but as the case is one of novelty and some difficulty, they will not give any costs.

MUSSUMAT BHOOBUM MOYEE DEBIA - *Appellant,*

AND

RAM KISHORE ACHARJ CHOWDHRY and CHUNDRABULLEE DEBIA - } *Respondents.**

On appeal from the Sudder Dewanny Adawlut of Calcutta.

6th, 7th, & 9th March, 1865.

THE questions in this appeal were, first, whether the first Respondent, *Ram Kishore*, the adopted son of the late *Gour Kishore Acharj Chowdhry*, by his wife, *Chundrabullee Debia*, the other Respondent, was, as such, entitled to the ancestral and other estates of

In the year 1811, *G.* being childless, executed a deed of *Onoomuttee puttro* (*i.e.* of permission), by which he gave power to his wife, *C.*, to adopt a son. He afterwards had a son, *B.*, by his wife, *C.* In 1819, two years after his son's birth, and while he was living, *G.* executed the following instrument:—"This is an *Onoomuttee puttro* to the following purport—Prior to the birth of a male child from your womb, I executed in your favour an *Onoomuttee puttro* on the subject of your receiving an adopted son. Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race or from a different race, for the purpose of performing mine or your *Sradh* and other rites, and for the *Sheba* of the gods, and for the succession to the *semindary* and other property, on which, if the adopted son be non-existent, which God forbid, then you shall, according to your pleasure, on failure of one, adopt other sons in succession, to avoid the extinction of the *pinda;* that *dattaka* son shall be entitled to perform your and my *Sradh*, &c., and of our ancestors." *B.*, on coming of age, succeeded to the ancestral and other estate of his father who had died. On *B.*'s death, childless, his widow succeeded as heir to her deceased husband, taking a vested estate in the whole of his estate. Some time after *B.*'s death, *C.*, his mother, exercised the power given her by the instrument of 1819, by adopting a son to *G.* The *Sudder Dewanny* Court held, first, that the above instrument was of the nature of a testamentary disposition, and se-

* Present:—Members of the *Judicial Committee*, The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors:—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

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Gour Kishore under the terms of an *Onoomuttee puttro*, a deed of permission to adopt, given by him to his wife, which instrument the Respondents contended, was, in effect, a testamentary disposition, constituting *Ram Kishore*, as such adopted son, sole heir; and secondly, whether an adoption by the Appellant, under an alleged deed of permission given by her husband *Bhowanee Kishore*, the son of *Gour Kishore*, was established.

Gour Kishore Acharj Chowdhry, a Hindoo and Brahmin by caste, was the *Zemindar* of four *annas* share of *Pergunnah*, *Allap Singh*, in the *Zillah* of *Mymensingh*, in the Presidency of *Bengal*, and in the month of *Magh*, 1215 (*February*, 1808), having then no son, he executed a deed of permission in favour of his wife, the Respondent, *Chundrabullee Debia*, to adopt a son to him.

Afterwards, and on the 22nd *Poos*, 1224 (*December*, 1817), the Respondent, *Chundrabullee Debia*, gave birth to a son, named *Bhowanee Kishore*.

condly, upon its construction, that it created a limitation on failure of male issue of the Testator, in the lifetime of his wife, to the son to be adopted by her as a *persona designata*. Upon appeal, such decree reversed, the Judicial Committee holding:—

First, that the instrument was simply a permission to adopt a son, as in the absence of any devise it could not be considered as of a testamentary character.

Secondly, that although a testamentary power of disposition by Hindoos in the Presidency of *Bengal* has been established by the decisions of the Courts, yet the nature and extent of such power, so far as relates to limitations in tail male, or executory devises, is not to be regulated or governed by any analogy to the law of *England*, which law applies to the wants of a state of society widely differing from that which prevail among Hindoos in *India*.

Thirdly, that as an adopted son by the Hindoo law takes by inheritance, and not by devise, and as by that law, in the case of inheritance, the person to succeed must be the heir of the full owner, *B.*, the son was the last full owner, and his wife succeeded at his death as his heir to her widow's estate; and

Fourthly, consequently, that the adoption by *C.* under the *Onoomuttee puttro*, was void, as the power was incapable of execution.

Whether, by the Hindoo law, *G.* could have restricted the interest of his son *B.* in his ancestral and other estate to a life interest, or could have limited it over, if his son *B.* left no issue male, or such issue male had failed, to an adopted son of his own—*Quære?*

Notwithstanding the birth of *Bhowanee Kishore*, his father, *Gour Kishore*, executed a fresh deed of permission, in favour of his wife, *Chundrabullee Debia*, on the 25th *Kartick*, 1226 (9th of *November*, 1819), which was as follows:—"This is an *Onoomuttee puttro*, to the following purport:—Prior to the birth of a male child from your womb, I had executed in your favour an *Onoomuttee puttro* on the subject of your receiving an adopted son. Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race (*gotra*), or from a different race (*gotra*), for the purpose of performing mine and your *Sradh* and other rites, and for the *Sheba* (service) of the gods and for the succession to the *Zemindary* and other property; on which, if the adopted son be non-existent, which God forbid, then you shall, according to your pleasure, on the failure of one, adopt other sons in succession, to avoid the extinction of the *pinda* (funeral cake or offering); that *dattaka* (adopted) son shall be entitled to perform your and my *Sradh*, &c., and that of our ancestors, and also to succeed to the property. To this end I execute this *Onoomuttee puttro*." The original and compared copy of this deed of permission were registered on the 12th *November*, 1819, by that Registrar of deeds under *Ben.* Reg. XX. of 1812.

Gour Kishore died in 1821, leaving his wife, the Respondent, *Chundrabullee Debia*, and his son, *Bhowanee Kishore*, him surviving.

In consequence of the minority of *BhowaneeKishore*, the *Zemindary*, and other property came under the surveillance of the Court of Wards; and on the 28th of

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November, 1821, that Court passed an Order appointing the Respondent, *Chunderbullee Debia*, guardian of *Bhowanee Kishore*, during his minority.

Bhowanee Kishore, after attaining his majority, was put in possession of the *Zemindary*, and married the Appellant and died, without issue, on the 14th *Bhadro*, 1247 (28th of *August*, 1840).

At his death, the Appellant brought forward an instrument, alleged to be a Will executed by *Bhowanee Kishore*, authorizing her to adopt a son for him, but no steps were taken by the Appellant with a view to the adoption of a son under the provisions of this instrument until the month of *November*, 1843, when, disputes having arisen between the Appellant and the Respondent, *Chundrabullee Debia*, both of whom were in receipt of the income of the estate, the Appellant notified her intention to take in adoption one *Rajendro Kishore*, an intention which, as she alleged, she subsequently, in the month of *December*, 1843, carried out by adopting him in due form.

The Respondent, *Chundrabullee Debia*, afterwards, in the month of *Bysack*, 1251 (*April—May*, 1844), proposed to the father and mother of the Respondent, *Ram Kishore*, that he should be given to her, in adoption, in conformity with the deed of permission of the 25th *Kartick*, 1226 ; and under the provisions of another *Onoomuttee puttro*, dated 15th *Bysack*, 1251, given by the father of the first-named Respondent to his wife, and a *dan puttro* (deed of gift in adoption) and a *grohen puttro* (deed of acceptance), both dated the 31st *Bysack*, 1251, the arrangements as to the adoption were laid down, and such adoption was afterwards completed.

Upon this adoption, the first-named Respondent, under the terms of the deed of 25th *Kartick*, 1226,

claimed to be entitled to inherit the whole of the property of *Gour Kishore;* but the Appellant, *Bhoobun Moyee*, and the Respondent, *Chundrabullee Debia* still continued to hold the property.

In consequence, a plaint was filed in the Court of the Principal *Sudder Ameen* of *Zillah Mymensingh*, on the 14th of *August*, 1851, on behalf of *Ram Kishore*, as the adopted son of *Gour Kishore*, by *Goluck Kishore*, his elder brother, as his next friend, against the Appellant, *Bhoobun Moyee*, for herself, and as guardian of the alleged adopted son, *Rajendro Kishore*, and *Chundrabullee Debia*, and two others, named *Anund Moyee* and *Jugodumba*, to obtain possession and recover the mesne proceeds of the *Zemindary* and other property, moveable and immoveable, held by the Defendants. The statements in the plaint were, in substance, that *Gour Kishore* granted to his wife, *Chundrabullee Debia*, the deed of permission, in the nature of a Will, dated 25th *Kartick*, 1226. That *Gour Kishore* died in *Assin*, 1228, leaving real and personal property as specified in a schedule to the plaint annexed. That under the management by the Court of Wards during the minority of *Bhowanee Kishore*, certain *Zemindaries* and other property specified in the schedule were purchased out of accumulated profits. That *Bhowanee Kishore* was in a state of insensibility on the 10th *Bhadro*, 1247, and continued in that state until his death on the 14th *Bhadro*. That *Ram Kishore* was duly adopted by *Chundrabullee Debia*, in accordance with the deed of permission of the 25th *Kartick*, 1226, and the proper ceremonies were duly performed. That *Ram Kishore*, upon such adoption, became the sole proprietor of all the estates and property specified in

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the schedule. That after the death of *Bhowanee Kishore*, divers persons in collusion with *Bhoobun Moyee*, fabricated a deed of permission, purporting to be signed by *Bhowanee Kishore* and to bear date the 12th *Bhadro*, 1247. That such deed of permission was drawn in such terms as to render objections to the authenticity or validity thereof improbable on the part of *Chundrabullee Debia* and *Anund Moyee* and *Jugodumba;* and it was submitted that such deed of permission set up by *Bhoobun Moyee* was a forged and fabricated document.

The Appellant, by her answer to the plaint, after setting forth certain pleas in bar of the suit, in substance, pleaded, that no weight could be attached to the averments in the plaint as to the deed of permission given to *Chundrabullee Debia* by *Gour Kishore*, as *Bhowanee Kishore*, upon attaining his majority, became entitled to an absolute interest in the property which descended to him from *Gour Kishore*. That *Gour Kishore* could not have given a valid deed of permission to adopt in the lifetime of *Bhowanee Kishore*, and further, that the deed of permission given could not operate as a Will. That *Bhowanee Kishore* actually executed a deed of permission in favour of the Appellant on the 12th *Bhadro*, 1247, at which time he was well in health and in the full enjoyment of his faculties. That the genuineness of that deed of permission was established by the acts of the Respondent, *Chundrabullee Debia*, in conjunction with the Appellant, in conformity therewith, and by certain statements alleged to have been made by *Chundrabullee Debia;* that the son adopted by the Appellant on the 20th *Aughran*, 1250, agreeably to such deed of permission, was the rightful proprietor of the entire

property; that *Ram Kishore* was not taken in adoption by the Respondent, *Chundrabullee Debia*, under any arrangement with, or with the consent of his father; and that in consequence of impurity attaching to the mother of *Ram Kishore* after the death of her husband, *Ram Kishore* could not have been given and received in adoption; and, lastly, that *Ram Kishore*, in consequence of his age, could not have been adopted in conformity with the Hindoo law.

The Respondent, *Chundrabullee Debia*, by her answer, alleged statements to the effect, that the adoption of *Ram Kishore* had been duly effected by her in exercise of the power given to her by the deed of permission of the 26th *Kartick*, 1226, and that no deed of permission was ever executed by her son, *Bhowanee Kishore*, in the Appellant's favour, and that she had been fraudulently induced to act, or appear to act, in conformity with the fabricated deed of permission to adopt relied on by the Appellant.

As soon as the first Respondent came of age, he was substituted as Plaintiff in the stead of *Goluck Kishore*.

Evidence was entered into. As respected the genuineness of the *Onoomuttee puttro*, of the 25th *Kartick*, 1226, the evidence given consisted of a certified copy from the Register Office of the copy of the original deed, which was filed in that office on the 28th *Kartick*, 1226, three days after the date of the deed, which was produced on behalf of the first Respondent, together with certified copies of two *Vakalutnamahs* executed by *Gour Kishore* and *Chundrabullee Debia* respectively, authorizing the *Vakeels* to attend for the purpose of the registration of the deed. The original deed of permission was called for by the Court from *Chundrabullee Debia*,

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but was not produced. As soon as the first Respondent took upon himself the conduct of the suit, he applied to the Court for an Order calling upon *Chundrabullee Debia* to produce the original deed, but the Principal *Sudder Ameen* declined to accede to that application. The three persons who were present at the time of the execution of the deed by *Gour Kishore*, deposed to the fact of such execution. As respected the fact of the adoption of the first Respondent by *Chundrabullee Debia*, under the power given to her by the deed of permission of 25th *Kartick*, 1226, evidence was given of his adoption, and that the ceremonies usual in a case of Hindoo adoption were duly performed in the case of his adoption. In opposition to this evidence in support of the fact of the adoption, the Appellant filed a copy of an *Urzee* of a testamentary character, purporting to be signed by *Gokool Kishore*, and to bear date the 28th *Bysack*, 1251, by which one *Sheebnarain* was appointed executor and guardian of the first-named Respondent, until he attained his majority; but to prove that this *Urzee* was a forgery, a certified copy of a petition of *Sheebnarain*, dated the 12th *Jeyt*, 1251, was produced, in which the *Urzee* was stated to have been prepared by the Appellant, and to be a forgery, and also by the deposition of *Sheebnarain*, who was examined as a witness. The Appellant also endeavoured to establish as a fact that, on the 31st *Bysack*, 1251, the first Respondent was too old to be taken in adoption, in accordance with the Hindoo law, and that consequently, the adoption at that time was invalid; but she failed to prove that the Respondent was older than he stated himself to be, or to show that the adoption was invalid, even if the Re-

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spondent were as old as alleged. The Appellant also objected that, on the 31st *Bysack*, 1251, *Hurro Soondree*, the first Respondent's mother, was under impurity, in consequence of the recent death of her husband, *Gokool Kishore*, and that, in accordance with the opinion of *Pundits*, she was incapacitated from giving the first-named Respondent in adoption on that day.

As respected the alleged forgery of the deed of permission by *Bhowanee Kishore* relied upon by the Appellant, it appeared that the document was never registered, and the non-registration was not satisfactorily accounted for by the Appellant. From the evidence of witnesses called on behalf of the first-named Respondent, it appeared that the document was fabricated under the instrumentality of one *Rughoo Dutt*, who was in the service of the Appellant; that after a rough draft had been made, a copy was made upon a stamped paper of the value of Rs. 70; that in consequence of some mistakes in this copy, another copy was made upon a fresh stamped paper of the same value, and that after attempts to obtain the signatures of respectable persons as witnesses to the deed, *Rughoo Dutt* and his accomplices were obliged to be satisfied with the attestations of persons of the lowest class. In addition to the witnesses who deposed to these facts from personal knowledge, there were also many persons called on behalf of the first-named Respondent, who deposed to the forgery of the document having been a matter of general notoriety in the neighbourhood. *Rughoo Dutt* was not called by Appellant as a witness.

Witnesses who were in the service of *Bhowanee Kishore*, and in daily attendance upon him during the illness which terminated his death, deposed on behalf of the first-named Respondent, that *Bhowanee Kishore*

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returned from hunting in a state of high fever, and that he was insensible for the four days preceding his death, and consequently incompetent to give instructions for or to execute any document. Witnesses were called by the Appellant to rebut these allegations. Some of them deposed that *Bhowanee Kishore* was quite well at the time of the execution of the alleged deed in contradiction to the language of the deed itself, which stated that he was ill. It was also proved that at the time of *Bhowanee Kishore's* illness and death, at *Mooktagacha*, there were many of his relatives residing near that place, and that they and neighbouring *Zemindars* visited him daily until he died, but no relative, or friend, or medical attendant was present at the time when the Appellant's witnesses stated that the alleged deed was executed by *Bhowanee Kishore*.

In opposition to the facts so established, the Appellant endeavoured to support the validity of the deed mainly upon the ground of *Chundrabullee Debia's* acquiescence in or non-objection to the provisions of that document, and in order to show the early assent of *Chundrabullee Debia* to the deed, the Appellant produced a copy of a written statement purporting to be signed by *Chundrabullee Debia* on the 26th of *September*, 1840.

The suit came on for hearing before the Principal *Sudder Court Ameen* (*Syud Ahmud Buksh*), in the month of *April*, 1855, and on the 20th of that month, that Judge passed a decree dismissing the suit with costs. The reasons for the decree stated in his judgment were, first;—that inasmuch as the original deed of permission of 26th *Kartick*, 1226, had not been filed, neither the authenticated copy from the Registry office, nor the duplicate copy filed with the original at the time of registration,

which had been called for from the Registry office, were admissible as evidence; secondly, that the *Onoomuttee puttro* executed by *Gokool Kishore*, and the *grohen puttro* and *dan puttro* as to the first Respondent, were not proved; and thirdly, that, although there was no necessity to enter into an investigation as to the validity of the deed of permission set up by the Appellant, the opinion which he had formed was that it had been satisfactorily proved by the evidence of the witnesses thereto; that it had been recognized by *Chundrabullee Debia*, who, by her acts and conduct, had established the validity thereof; and that there was a strong presumption in favour of its genuineness.

The first-named Respondent appealed from this decree to the *Sudder Dewanny Adawlut*.

The appeal came on for hearing on the 30th of *January*, 1858, before Messrs. *Colvin*, *Sconce*, and *Trevor*, three of the Judges of that Court, and a decree on that date was passed dismissing the appeal with costs.

Separate judgments were delivered by the three Judges. Mr. *Colvin*, in his judgment, held that it was unnecessary to go into the question of the execution of the different deeds relied on until the disposal of certain preliminary questions, stated by the Court as follows:—"Even supposing *Gour Kishore* to have given to *Chundrabullee Debia* the authority to adopt, asserted by the Appellant, could he by Hindoo law thereby preclude the exercise afterwards of the power of adoption by his son, *Bhowanee Kishore*, and did the terms of the deed alleged to have been executed by *Gour Kishore* show that such was his intention?" And accordingly the arguments on the hearing of the appeal and the several judgments of the three

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Judges, were confined to the questions thus stated by the Court.

As the decree of the 30th of *January*, 1858, was founded upon judgments which assumed that which was the chief point in dispute between the parties—*viz.*, the validity of the deed of permission set up by the Appellant; the first Respondent moved for a review of that decree; and a review was admitted by Mr. *Sconce*, who expressed his reasons for such admission in his judgment in the following terms:—"My judgment was originally given on the presumption that the *Onoomuttee puttro* set up by *Bhoobun Moyee*, widow of *Bhowanee Kishore*, and the adoption of the Defendant under it, were legally valid; and being satisfied from the cause shown by the Plaintiff's Counsel, that they should have an opportunity of taking the opinion of the Court upon that matter, I admitted the re-entertainment of the appeal, that the issues not before gone into might be adjudicated upon."

The hearing of this review took place on the 7th of *March*, 1859, in the *Sudder Dewanny Adawlut*, before Messrs. *Sconce*, *Trevor*, and *Colvin*, and separate judgments were on that day delivered by those Judges.

Messrs. *Sconce* and *Trevor* in their judgments held, in effect, first, that the fact of the execution of the deed of permission of 25th *Kartick*, 1226, by *Gour Kishore* was proved, and that, although the original deed had not been produced, yet under the circumstances, such secondary evidence as had been adduced on behalf of the first Respondent was admissible, and established the validity and terms of the deed; secondly, that *Chundrabullee Debia* had power under the deed of 25th *Kartick*, 1226, to adopt a son as heir of *Gour Kishore*, in the event of *Bhowa-*

nee Kishore dying without issue, or without having taken steps with a view to his being represented by a legally-adopted son; thirdly, that the adoption of the first Respondent as the son of *Gour Kishore* was such an adoption as was authorized by the deed of 25th *Kartick*, 1226, and that the adoption was valid according to Hindoo law; fourthly, that the alleged deed of permission set up by the Appellant was not executed by *Bhowanee Kishore*, but was a forgery; and lastly, that the acts of *Chundrabullee Debia*, in conformity with that forged deed of permission, could not prejudice or affect the rights of the first Respondent as the legally-adopted son of *Gour Kishore*.

With respect to the effect of the deed of permission to adopt being of a testamentary character, the following judgment was pronounced by Mr. *Trevor* on that point. "Having declared the deed propounded by the Plaintiff to be a genuine deed, the next point is as to its legal significance. It has been contended on the part of the Plaintiff by the Advocate General, that the deed of permission is in the nature of a testamentary instrument, or writing, by which an estate of the nature of a fee simple conditional, that is, upon condition that he had issue, was given to *Bhowanee Kishore;* that in the event of his having issue, the estate then became absolute; but that in the event of his having no issue, he was limited to a life interest in the property, and a future estate, in the nature of an executory devise, is created in favour of a son to be adopted by *Gour Kishore's* wife, *Chundrabullee Debia*. On the part of Defendant it was contended by Mr. *Money* that limited estates in land are unknown to this country, and are inconsistent with its revenue system; that as no Statute *de donis* here exists, or has ever existed, all estates created are in their nature absolute;

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that consequently, under the law, *Bhowanee Kishore's* estate was a fee simple absolute; and on his death, after having succeeded to his father's estate, it descended first to his son, either natural or adopted, and afterwards to his heirs under Hindoo law; that, moreover, the words of the deed are sufficient to pass absolutely the estate, and under the principle laid down by the House of Lords in the case of *Hoare* v. *Byng* (10 Cl. & Fin. pp. 508—533), as to personal property, which is identical with the rule which should be followed as to reality, it is impossible to give to a party a right to a thing out and out; to give an absolute interest in that thing, and then afterwards to restrict that absolute gift by limitation over; that consequently, under the deed of permission, admitting it to be genuine, the Plaintiff takes nothing. The estate to be taken under *Gour Kishore's* deed must be determined with reference to Hindoo law, and not to the general law of this country. It is consequently only necessary for me to remark that there is not the slightest ground for the position taken up by the Counsel for the Respondent, to the effect that limitations of estates are unknown to and are illegal according to the laws of this country. So far from this being the case, there being no Statutory enactment forbidding the same, it is competent to any one to limit and restrict future interests in land in any way that whim or ingenuity may suggest, though probably the exact terms used in the very learned work (*Fearn* on Contingent Remainders) to which we have been referred, may not be resorted to; and under the Hindoo law, limited or restricted estates are of daily occurrence. It is true that the hypothecation which Government has on every estate as security for its revenue, may have a tendency to check such dispositions, unless they

arise by operation of law; as on the occurrence of an arrear caused by a party with a limited interest, if it be not paid by parties with either a vested or contingent interest in the property, the estate is brought to sale, and by such sale all future interest would be defeated. But the existence of this rule, however it may have a tendency to check the exercise of it, is not inconsistent with the power itself of limiting estates which undoubtedly exists both under the general law of the country and under Hindoo law. Looking, then, on the deed of *Gour Kishore* by the light of Hindoo law, it appears to me that it is a testamentary disposition of his property, by which he devised it absolutely to his son, *Bhowanee Kishore*, and his heirs general, subject to a power of appointment by the widow, to be exercised in the event of his son, *Bhowanee Kishore*, dying without leaving a son either natural or adopted, or to be adopted, him surviving. This estate in the son was absolute, and permitted alienations which it could hardly have done were it only a fee simple conditional. Whatever interest, however, the heirs general of *Bhowanee Kishore* may have held under it, was subject to be destroyed by the exercise by the widow of the power of appointment when the executory devise in favour of the party so appointed would arise and displace it. By this means the direct succession to *Gour Kishore* and the performance of the necessary obsequial rites are effectively attained. Whatever objection might arise to such a disposition in other parts of *India* from the doctrine that the inchoate right of the son to property is from his birth, none such can arise in *Bengal*, where the above doctrine is not recognized, where, whilst the father lives and is free from defect, the sons have no right at all, and where by the power of making testamentary

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disposition, the father, if so minded, can will away, even to a stranger, the whole of his ancestral property. It has been objected by the Respondent to the exercise of the power of adoption by the widow of *Gour Kishore*, that as *Bhowanee Kishore* had married, and had succeeded to the property, his widow had, by virtue of her marriage, a vested right in the property, and that any act done in derogation of that vested right, could not be upheld. I find no authority for this doctrine in Hindoo law books. If the power of appointment can be exercised in derogation of the right of other heirs of the son, it can be exercised in derogation of that of the widow; and the fact of the son of *Bhowanee Kishore* having reached his majority and succeeded to the estates is, in a case like the present, where the object of the Testator is to perpetuate direct heirship, of itself deserving, it appears to me, of no lengthened consideration. Of the soundness of the principle laid down in the case of *Hoare* v. *Byng*, cited by the Counsel of the Respondent, and its applicability to this country, as well as to *England*, when circumstances rightly call for its application, there can be no doubt. As, however, it appears to me that the terms of the deed executed by *Gour Kishore* a power of appointment, in certain circumstances, remains in the widow, *Chundrabullee Debia*, it is not applicable to the present case."

Mr. *Colvin*, the other Judge, differed in opinion from Messrs. *Sconce* and *Trevor* in some material points, and in his judgment, held, in effect, first, that there was no doubt that *Gour Kishore* did execute the deed of permission of the 25th *Kartick*, 1226, and that it was never revoked by him; secondly, that if no more were involved in the case than which of the

two adoptions alleged was the most trustworthy, that of the first Respondent was to be preferred as the best supported by evidence; thirdly, that the intention of the deed of the 25th *Kartick*, 1226, was only to give power to *Chundrabullee Debia* to adopt a son in the event of *Bhowanee Kishore* dying in the lifetime of his father, *Gour Kishore;* fourthly, that *Chundrabullee Debia* had no authority to curtail the Appellant's enjoyment of the estate in succession to her husband, *Bhowanee Kishore;* and fifthly, that as there was no legal power in *Chundrabullee Debia* to adopt the first Respondent when she did, the appeal ought to be dismissed.

In conformity with the judgments of the majority of the Judges, a decree of the *Sudder Dewanny Adawlut* was passed on the 7th of *March*, 1859, in favour of the first Respondent, with costs of suit, and with *wassilat* from the commencement of the suit, and interest thereon up to the date of realization.

Before this decree was made, *Rajendro Kishore*, the adopted son of the Appellant, attained his majority and died, when the Appellant, as the widow of *Bhowanee Kishore*, and mother of *Koylas Kishore*, a minor, whom she alleged she had adopted on *Rajendro Kishore's* death, applied for leave to appeal to *England*.

The petition, together with the papers of the case, were brought up before Mr. *Samuells*, one of the Judges of the Court, on the 6th of *June*, 1859, and his proceeding of that date was recorded as follows:— The papers of this case have been laid before me in order that I might determine whether the fact of *Bhoobun Moyee*, who originally defends the suit as mother and guardian of *Rajendro Kishore*, having now preferred an appeal to the Privy Council as mother and guardian of another adopted son, *Koylas*

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Kishore, can in any way affect his right of appeal. It appears that *Rajendro Kishore* appeared in Court during the pendency of the suit, and alleging that he was of age, was allowed to plead. After the case was heard, but before the judgment was pronounced, he died. This circumstance was brought to the Court's notice at the time, but it did not appear to have been considered necessary to refer to it in the decision which was then given, and which turns entirely on the validity of the deed of adoption set up by *Bhoobun Moyee*. It seems that *Bhoobun Moyee*, who has appealed to the Privy Council against the decision which declared her deed invalid, has again asserted her right under that deed, by adoption of another son, named *Koylas Kishore*. As she claims to adopt under the deed of permission, and the validity of the deed is the chief point at issue, the appeal must go forward, and any questions which may arise out of the death of the first adopted son, will be decided by the Lords of the Privy Council. It is, of course, understood that the appeal goes on without prejudice to the rights of the Respondent, who protests against the recognition of the second adopted son, and denies the right of the widow to make any such adoption.

On the 3rd of *January*, 1860, an Order was made by the *Sudder Dewanny Adawlut*, admitting the appeal of the Appellant as widow of the late *Bhowanee Kishore*, and mother of *Koylas Kishore*, a minor.

Before the last-mentioned Order was made, the Appellant applied for a review of the decree of the 7th of *March*, 1859, and stated several objections to that decree, and upon the hearing of that application on the 14th of *January*, 1860, before Mr. *Trevor*, a review was admitted for the determination of one of the points raised by the objections. The views of Mr.

Trevor in admitting such review, are stated as follows: —"It remains then to consider the sixth objection to the Court's ruling, which is, that even if the deed of permission executed by *Gour Kishore* be a testamentary disposition of his own and the ancestral property, yet that disposition cannot extend to property admittedly purchased on behalf of *Bhowanee Kishore* from the profits of the ancestral properties, while they were under the charge of the Court of Wards during his minority, and which can, in no sense, be considered as property covered by the Will of *Gour Kishore*. This point was not mentioned by the *Vakeels* of either side when the case was last before the Court, and it consequently escaped the notice of the Court; but on adverting to the plaint and to the schedules annexed thereto, it is clear that the property claimed by the Plaintiff is divided by him into two classes, the first including ancestral property, and the second properties purchased from the profits of the ancestral estates whilst they were in charge of the Court of Wards, during *Bhowanee Kishore's* minority. As the minor, during his lifetime, was absolute owner of the estates which, on his death without a son, either natural or adopted, were made by the Will of his father, *Gour Kishore*, subject to the power of appointment by his father's widow, *Chundrabullee Debia*, it seems to me that there can be no question that the widow of *Bhowanee Kishore* is entitled to retain possession of those properties which were purchased while the ancestral estates were under the Court of Wards during the minority of her husband, and from the profits of those estates belonging to her husband in the hands of the Court of Wards, and for the determination of this point alone I admit a review of the judgment of this Court."

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The hearing of the review took place on the 19th of *April*, 1860, before Messrs. *Raikes*, *Trevor*, and *Loch*, three of the Judges of the *Sudder Dewanny Adawlut*, and a unanimous judgment of the Court was then pronounced. Such judgment, after stating reasons arising from the construction to be put upon the deed of the 25th *Kartick*, 1226, and from Hindoo law, for holding that the first Respondent did not take under the terms of that deed the whole of the property possessed by or in the enjoyment of *Bhowanee Kishore* at the time of his death, but only the property which had descended from *Gour Kishore*, and was in the possession or enjoyment of *Bhowanee Kishore*, concluded as follows:—Under the view of the case expressed above, we consider that the Plaintiff is only entitled under the testamentary disposition of *Gour Kishore*, to the property which descended from that individual, and that *Bhoobun Moyee*, the Defendant in the Lower Court, and the Petitioner before this, is entitled to retain possession of all the estates mentioned in the schedule filed by the Plaintiff as having been acquired by the Defendant's husband, *Bhowanee Kishore*, during the time the estates were under the Court of Wards during his minority. We, therefore, in variation of the decision of the Court of the 7th of *March*, 1859, decree to the Plaintiff only those properties which are mentioned in the schedule at the end of the plaint as being ancestral property, and formerly in possession of *Gour Kishore*, with mesne profits, to be ascertained in execution from the date of suit, and interest on the amount so ascertained, from the commencement of the year following that on which the *wassilat* accrues, up to the date of realization, and we dismiss his claim to the properties purchased from the profits of the estates of *Bhowanee*

Kishore while they were in the hands of the Court of Wards during his minority. The costs of both Courts will be borne by the parties in proportion to the amount decreed or dismissed.

From this decree, so far as it negatived the right of the first-named Respondent to the properties purchased from the profits of the estates of *Bhowanee Kishore*, while they were in the hands of the Court of Wards, that Respondent preferred an appeal to Her Majesty in Council. The present Appellant also lodged a petition of appeal to Her Majesty in Council, in which she claimed as widow of the late *Bhowanee Kishore*, and mother and heiress, according to Hindoo law, of *Rajendro Kishore*, the adopted son and heir-at-law of the former; and such petition submitted that the decree on review of the 7th of *March*, 1850 (except so far as the same had been reversed and altered by the decree on review of the 19th of *April*, 1860), should be reversed, and that the previous decrees of the *Sudder Dewanny Adawlut*, and of the Principal *Sudder Ameen*, be affirmed.

The appeal and cross were heard together. It was arranged that the Appellant should open first.

The Attorney-General (Sir *R. Palmer*) and Mr. *Leith*, for the Appellant.

If the adoption by the Appellant is not established, she, as widow of *Bhowanee Kishore* and heiress of her husband is entitled to his estate; but as the Plaintiff, as the next friend of the first Respondent, sued in his character of adopted son of the late *Gour Kishore*, and alleged that such adoption had been made by *Chundrabullee Debia*, his widow, he was bound to prove strictly his case, which, we submit, he failed

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to do. He failed to produce the original *Onoomuttee puttro*, which was alleged to contain the authority for such adoption, and upon which and its due execution, the Plaintiff's alleged adoption and consequent title and right to sue were entirely founded. A copy of the deed was improperly admitted by the Court below without proof of the execution of the original, or of its loss or destruction which was requisite to entitle it to be let in as secondary evidence. *Syud Abbas Alli Khan* v. *Yadeem Ramy Reddy* (*a*), *Ben.* Regs. XX. of 1812, sec. 2, cl. 5, XXXVI. of 1793, sec. III. and Act No. XIX. of 1853.

Then with respect to the alleged adoption of the first Respondent by *Chundrabullee Debia*, we contend, that such adoption was invalid, both with reference to the rules and requirements of Hindoo law, and according to the opinion of Mr. *Colvin*, the dissentient Judge, to the proper interpretation of the deed of permission to adopt, having regard to the circumstances under which, and the particular time, that the alleged power was exercised by *Chundrabullee Debia*; but the most important objection is, that Mr. *Trevor*, one of the Judges of the Court below, has wrongly imported principles of the English law relating to executory devises, in construing this permissive deed to adopt into an executory devise; nothing of the kind being known to the Hindoo law. No instance can be found in the Hindoo authorities of an adoption being good under such a devise, as this is improperly called by the Court below, where the son has attained full age and married. The deed purports to give the widow permission to adopt. It is not a power in the sense of the English law. No authority to support it can be found in the Hindoo law. *W. H. Macnaghten's*

(*a*) 3 Moore's Ind App. Cases, 156.

"Hindu Law," Vol. I. p. 66. It is only in default of male issue that adoption is allowed. *Strange's* "Hindu Law," Vol. I. p. 78 [2nd Ed.]. It is true that two of the Judges of the Court below concurred in opinion that the Respondent, *Ram Kishore's*, adoption was good, and not affected by the question of ceremonial impurity, and that although being 12 or 13 years of age as we allege at the time, and tonsure had been performed, he was not above the legal age for adoption, being a Brahmin by caste; yet the important question arises, whether as such adopted son of the late *Gour Kishore*, the father of the Appellant's husband, *Bhowanee Kishore*, who survived his father twenty-three years, and left the Appellant his childless widow, and as such, his admitted heiress by the Hindoo law, could displace and supersede the Appellant as such heir in the possession of the estates which devolved on her husband as an absolute estate of inheritance. We submit that such a power of appointment, if exercised by a mother, was invalid, if the son left a widow, as her vested rights, *Strange's* "Hindu Law," Vol. I. p. 134, would be defeated by its exercise. An adopted son takes as a posthumous son. *W. H. Macnaghten's* "Hindu Law," Vol. I. ch. VI. p. 70; *Gunga Mya* v. *Kishen Kishore Chowdhry* (*a*). After-born sons' rights are declared in the *Daya-Bhaga*, ch. VII., secs. 11 and 12. Another ground of invalidity of such adoption is, that by Hindoo law, a second adoption, the first son being alive, is illegal. *Rungama* v. *Atchema* (*b*); 1 *W. H. Macnaghten's* "Hindu Law," p. 70. *Bhowanee Kishore* succeeded to the ancestral estate and property by operation of law, as his father's sole heir, and not under any devise or be-

(*a*) 3 Ben. S. D. A. Rep. 128.
(*b*) 4 Moore's Ind. App. Cases, 1.

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quest from him, and the estate and property being in him, as admitted by the decree, as an absolute estate of inheritance, vested, on his death, in the Appellant, as his widow and heiress, therefore her title and interest therein could not be displaced or divested by the act of *Chundrabullee Debia* subsequently adopting a son, so as to vest the estate and property in such son as heir-at-law, not of the Appellant's deceased husband, but of his father, whose interest in the same ceased and determined on his death.

Although we were not bound to do so, in consequence of the Plaintiff's failure in proof of his title, yet we submit that the Appellant satisfactorily proved the execution of the deed containing the authority of her deceased husband to adopt a son or sons to him, under which instrument she adopted *Rajendro Kishore*, according to the requirements of the Hindoo law, as decreed by the Principal *Sudder Ameen*, and after his death, *Koylas Kishore*.

Mr. *Forsyth*, Q.C., and Mr. *W. H. Melvill*, for the Respondent, *Ram Kishore*.

It was satisfactorily proved that *Gour Kishore* executed the deed of permission to adopt, dated the 25th *Kartick*, 1226, and in pursuance of such deed, *Chundrabullee Debia* adopted the first Respondent, who thereby became entitled to the estates in dispute. This deed was sufficiently proved by an authenticated copy from the Registrar's Book. The case of *Syud Abbas Alli Khan* v. *Yadeem Rama Reddy* (*a*) does not apply. There was no proof of the original deed in that case, and the fragments produced evidently bore marks of being fabricated. Here the duplicate deed coming out of the proper place of

(*a*) 3 Moore's Ind. App. Cases, 156.

custody, the Registry of deeds, was properly received in evidence. *Ben.* Regs. XXXVI. of 1793, sec. III.; and XX. of 1812, sec. II. cl. 5.

Such deed of permission to adopt was of a testamentary character, and good by Hindoo Law, *F. Macnaghten's* "Cons. on Hindoo Law," p. 168, and as a Will is recognized in *Bengal*, with the English law of limitations engrafted on the Hindoo law, *Sonatun Bysack* v. *Sreemully Juggutsoondue Dossee* (*a*), it operated as an executory devise, and was sufficient to prevent *Bhowanee Kishore* executing an instrument which would have the effect of defeating the disposition of *Gour Kishore* under such deed of permission. The objection to the validity of *Ram Kishore's* adoption is unfounded; first, he was of proper age, *F. Macnaghten's* "Cons. on Hindoo Law" pp. 142, 3, 6; 1 *W. H. Macnaghten's* "Hindoo Law" p. 71; secondly, a widow can adopt a son to her deceased husband, 1 *Strange's* "Hindu Law" p. 79. The *Mitacshara*, ch. I. sec. XI. p. 1. The consequence of adoption is that the adopted son becomes an alien from his family. The adopted son cannot be deprived of his adopted father's estate. But we contend, that the instrument giving permission to adopt, which the Appellant alleges to have been executed by *Bhowanee Kishore*, is palpably a forgery, and that no valid or legal adoption could have taken place in pursuance of such instrument. [Lord *Kingsdown.*—Their Lordships have arrived at the conclusion that the alleged Will, or deed of adoption, relied upon by the Appellant is a forgery, so you may relieve yourself of that part of the case]. Even if the forged deed was genuine, the claim of the Appellant to her widow's rights was negatived by the

(*a*) 8 Moore's Ind. App. Cases, pp. 66, 78.

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alleged adoption of *Koylas Kishore* on *Rajendro Kishore's* death.

Their Lordships' judgment, having been reserved, was now pronounced by 26th May 1865.

The Right Hon. Lord KINGSDOWN.

The appeal in this case arises out of a suit brought by the Respondent, *Ram Kishore*, to recover certain estates in *Bengal*, which were claimed by and were in the possession of the Appellant and of *Rajendro Kishore*, whom she alleged to be her adopted son.

The facts, so far as they are necessary to make our judgment intelligible, are these :—

Gour Kishore Acharj, being the owner of considerable estates in *Bengal*, died in the year 1821. He left surviving him a widow named *Chundrabullee Debia* and an only son named *Bhowanee Kishore*.

At the time of his father's death, *Bhowanee Kishore*, who succeeded as his heir, was about four years of age. He attained, however, his majority, and married the Appellant, *Bhoobun Debia*. He died in the month of *August*, 1840, being then about twenty-four years old. He left no issue, and *Bhoobun Debia*, his widow, became the heir of his property, as well ancestral as of other estates which had been purchased with his own money during his life.

Immediately upon the death of *Bhowanee Kishore*, an instrument was set up, as being his Will, by *Chundrabullee Debia*, his mother, and *Bhoobun Debia*, his widow. By this instrument, power to adopt a son was given to *Bhoobun Debia*, and until such adoption was made, the income of the estates was given to *Chundrabullee Debia* and *Bhoobun Debia*.

Under this alleged Will, these two ladies took possession of the estates of *Bhowanee Kishore*, and

remained in the enjoyment of them for nearly four years.

In *December*, 1843, *Bhoobun Debia* professed to exercise the power alleged to have been given to her by the instrument already referred to, and adopted a boy called *Rajendro Kishore*.

Upon this, a quarrel appears to have arisen between *Chundrabullee Debia* and *Bhoobun Debia*, and *Chundrabullee Debia* alleged that the supposed Will of *Bhowanee Debia*, under which she had so long been in the enjoyment of half his property, was a forgery, and had not been made till after his death, and that *Bhoobun* had no power of adoption. She further set up an instrument called an *Onoomuttee puttro*, or deed of permission, by which she alleged that a power to adopt a son had been given to her by her husband, *Gour Kishore*, in his lifetime, and which power, in the events which had happened, she claimed a right to exercise.

She accordingly adopted, or professed to adopt, the Respondent, *Ram Kishore*, as the son of *Gour Kishore*, her late husband.

Bhoobun Debia, on behalf of *Rajendro Kishore*, her adopted son, having obtained possession of all the property of *Bhowanee Kishore*, the suit in which the present appeal was brought, was instituted in 1852, in the *Zillah* Court of *Mymensing*, by a next friend of *Ram Kishore*, on his behalf, against *Bhoobun Debia* and *Rajendro Kishore*, and certain other persons, the Plaintiff claiming, as the adopted son of *Gour Kishore*, the whole property, ancestral and acquired, of *Bhowanee Kishore*. To this suit *Chundrabullee Debia* was made a Defendant, instead of suing as a Plaintiff, on behalf of her son; that course being adopted probably with a view to avoid any prejudice

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which might arise from the inconsistency of her previous conduct with the title now set up for her son.

When the case came before the *Sudder Ameen*, he was of opinion that the Plaintiff must recover upon the strength of his own title, and that if such title failed, it was unnecessary to decide upon the case of the Defendants.

He was of opinion that the Plaintiff had failed to prove his title, and he, therefore, dismissed the suit, expressing at the same time a strong opinion in favour of the Defendant's adoption.

He awarded the costs of the suit to the Defendants, with the exception of *Chundrabullee Debia*, whom he held to be really the promoter of the suit.

From this decision there was an appeal to the *Sudder Dewanny* of *Calcutta*. The case was heard upon several different occasions. Finally, the Judges were unanimously of opinion that the adoption of *Rajendro Kishore* was invalid, and that the Will of *Bhowanee Kishore*, purporting to create the power of adoption, was a forgery. They were equally unanimous in holding that the *Onoomuttee puttro* of *Gour Kishore* was a genuine and valid instrument, and that if the power to adopt continued at the time when *Chundrabullee Debia* professed to execute it, there had been a valid adoption. One of the Judges was of opinion that the power was gone, and that the adoption was invalid. The other two were of opinion that the power existed at the time of the adoption, and a decree was made, therefore, in favour of the Plaintiff as to the ancestral property of *Bhowanee Debia*, but not as to his self-acquired property; and the costs of the parties were ordered "to be borne by them in proportion to the amount of the property decreed or dismissed."

The case now comes before us on appeal by *Bhoobun Debia*, as representing her own rights and the rights of a son, whom she had adopted in lieu of *Rajendro Kishore*, who is dead, and on a cross-appeal by *Ram Kishore*, complaining that the decree in his favour ought to have included the self-acquired property as well as the ancestral property of *Bhowanee Kishore*.

On the hearing of these appeals, we expressed a clear opinion, without calling on the Respondent's Counsel, that the Court below was right in holding that the alleged Will of *Bhowanee* was a forgery. The evidence is irresistible that it was contrived by the different members of his family after his death, in order to give effect to an arrangement which they considered would be for the common benefit. This being so, and no power of adoption having been proved or alleged to have been given by parol, the adoption of *Rajendro Kishore* and of the son now substituted for him, must of course be held in this suit to be invalid.

The next question is, as to the validity of the adoption of *Ram Kishore*. We see no reason to dissent from the opinion of the Court below upon the facts of the case, viz., that the *Onoomuttee puttro* of *Gour Kishore* is a genuine instrument, and that, supposing the powers given by it to have been in force when the adoption under it took place, the adoption was good; but we think it unnecessary to examine into the genuineness of this instrument, as we are of opinion that at the time when *Chundrabullee Debia* professed to exercise it, the power was incapable of execution.

It will be necessary to go into this part of the case with some minuteness.

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It appears that some years before the birth of *Bhowanee*, and in the year 1811 of our era, *Gour Kishore* being then childless, and anxious, as Hindoos generally are, to provide a son by adoption, if he should have no natural-born son, executed an *Onoomuttee puttro* on the 30th of *March*, 1811, by which he gave power of adoption to *Chundrabullee*, his wife.

In 1819, two years after the birth of *Bhowanee*, he executed the instrument on which the present question depends, which is in these words. [His Lordship read the deed, *ante*, p. 281.]

The first question which arises is as to the construction of this instrument. It seems to have been considered by the two Judges of the *Sudder* Court, who decided in favour of the Respondent (certainly by one of them), that the document was to be regarded as a Will, and as containing a limitation, on failure of male issue of the Testator in the lifetime of *Chundrabullee Debia*, of the estate of the Testator, to a son to be adopted by *Chundrabullee Debia*, as a *persona designata;* and one of the Judges, in a very elaborate argument, refers to Mr. *Fearne's* celebrated treatise on Contingent Remainders, in order to show that such a devise by the English law would be valid. There is no doubt that by the decision of Courts of Justice, the testamentary power of disposition by Hindoos has been established within the Presidency of *Bengal;* but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of *England*. Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of state of a society dif-

fering as far as possible from that which prevails amongst Hindoos in *India*.

But their Lordships are quite satisfied that there is in this case no room for the application of any such doctrines. The instrument before us is merely what it purports to be, a deed of permission to adopt; it is not of a testamentary character, it was registered as a deed in the lifetime of the maker; it contains no words of devise, nor was it the intention of the maker that it should contain any disposition of his estate, except so far as such disposition might result from the adoption of a son under it. He mentions the objects which induced him to make the deed—religious motives, the perpetuation of his family, and the succession to his property; but it was by the adoption, and only by the adoption, that those objects were to be secured, and only to the extent in which the adoption could secure them.

The main ground of the decision in the Court below appears, therefore, to fail, and this instrument must be construed, and its effect must be determined, in just the same way as if it had been made in one of the Provinces of *India*, in which the power of testamentary disposition is not recognized.

How, then, is the deed to be construed when we regard it merely as a deed of permission to adopt? What is the intention to be collected from it, and how far will the law permit such intention to be effected? It must be admitted that it contemplates the possibility of more than one adoption; that it shows a strong desire on the part of the maker for the continuance of a person to perform his funeral rites, and to succeed to his property; and that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some

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limits must be assigned. It might well have been that *Bhowanee* had left a son, natural born or adopted, and that such son had died himself, leaving a son, and that such son had attained his majority in the lifetime of *Chundrabullee Debia*. It could hardly have been intended that after the lapse of several successive heirs a son should be adopted to the great-grandfather of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

But whatever may have been the intention, would the law allow it to be effected? We rather understand the Judges below to have been of opinion that if *Bhowanee Kishore* had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to *Chundrabullee Kishore* would have been at an end.

But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us.

In this case, *Bhowanee Kishore* had lived to an age which enabled him to perform—and it is to be presumed that he had performed—all the religious services which a son could perform for a father. He had succeeded to the ancestral property as heir; he had full power of disposition over it; he might have alienated it; he might have adopted a son to succeed to it if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to the property.

On the death of *Bhowanee Kishore*, his wife succeeded as heir to him, and would have equally succeeded in that character in exclusion of his brothers, if he had had any. She took a vested estate, as his widow, in the whole of his property. It would be singular if a

brother of *Bhowanee Kishore*, made such by adoption, could take from his widow the whole of his property, when a natural-born brother could have taken no part. If *Ram Kishore* is to take any of the ancestral property, he must take all he takes by substitution for the natural-born son, and not jointly with him.

Whether under his testamentary power of disposition *Gour Kishore* could have restricted the interest of *Bhowanee Kishore* in his estate to a life interest, or could have limited it over (if his son left no issue male, or such issue male failed) to an adopted son of his own, it is not necessary to consider; it is sufficient to say that he has neither done nor attempted to do this. The question is, whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of *Gour Kishore* would not have taken.

This seems contrary to all reason and to all the principles of Hindoo law, as far as we can collect them.

It must be recollected that the adopted son, as such, takes by inheritance and not by devise. Now, the rule of Hindoo law is, that in the case of inheritance, the person to succeed must be the heir of the last full owner. In this case, *Bhowanee Kishore* was the last full owner, and his wife succeeds, as his heir, to a widow's estate. On her death, the person to succeed will again be the heir at that time of *Bhowanee Kishore*.

If *Bhowanee Kishore* had died unmarried, his mother, *Chundrabullee Debia*, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power

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of adoption, she would have devested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the Text-books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and devested.

The only case referred to in the argument before us, or in the judgment below, as tending in that direction, is that of *Luckinarain Tagori*, reported by Sir *F. Macnaghten*, "Cons on Hindu Law," p. 168; but it is incontestable that in that case the disposition depended wholly on the testamentary power. The authority to adopt was only subsidiary to the disposition of the property. The Will of *Luckinarain Tagori* is set forth in full in No. 5, p. 9, of the Appendix to Sir *F. Macnaghten's* work. It is termed a Will; it appoints an Executor; it disposes of the whole estate; gives various legacies; gives the residue to the child of which his youngest wife was pregnant, whether a son or a daughter, in which latter case it would obviously break the legal order of succession; and directs that at that child's death the adoption of a son shall take place. We have already said that we express no opinion as to the power of *Gour Kishore* to have made the disposition now insisted on by the Appellant by devise of his estates, but we find no such devise in the instrument which he has executed.

An additional difficulty in holding the estate of the widow of *Bhowanee Kishore* to be devested may, perhaps, be found in the doctrine of Hindoo law, that the husband and wife are one, and that as long as the wife survives, one-half of the husband survives; but it is not necessary to press this objection.

Upon the whole, we must humbly report to Her Majesty our opinion on the original appeal that the Plaintiff's suit ought to be dismissed; but, inasmuch as the main expense of it has been occasioned by the Appellant setting up a state of facts which has turned out to be untrue, and disputing the facts alleged by the Respondents, which have been established, we think that no costs should be awarded to either party of the suit or of the original appeal. The cross-appeal is wholly groundless, and we must advise that it be dismissed with costs.

The several Orders and decrees complained of, so far as they are inconsistent with the above recommendations, must be reversed.

MUTUSAWMY JAGAVERA YETTAPA NAIKER - - - - } *Appellant,*

AND

VENCATASWARA YETTIA - - - *Respondent.**

On appeal from the High Court at Madras.

27th Nov. 1865.

THIS was a petition for leave to appeal from a decree of the High Court at *Madras*, dated the 3rd

Special leave to appeal granted, notwithstanding that no application had been made for such leave to the Court below: upon the allegation, that though the amount decreed was much under the appealable value, the original demand being necessarily limited by the jurisdiction of the Court in which the suit was originally instituted, yet the subject matter at issue exceeded in value the appealable amount.

* Present: Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor: The Right Hon. Sir Lawrence Peel.

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of *January*, 1865, which affirmed a decree of the Civil Court of *Tinnevelly* of the 31st of *March*, 1864, awarding to the Plaintiff (the Respondent), as the illegitimate son of the Appellant's eldest brother, a former *Zemindar* of *Yettiapooram*, an annual maintenance of Rs. 2,500 from the villages forming the private property of the present *Zemindar's* family. The Defendant (the present Appellant) disputed the Plaintiff's claim, alleging that he was not the illegitimate son of the late *Zemindar*, that his mother was a dancing woman (wearing *Botter* on her neck) attached to a *Pagoda* at *Kalugumalia*, situate within the *Zemindary;* this *Botter* being different from *Tally* (nuptial mark), worn by married women among *Hindoos*, and he insisted that she was a *Dasce*, or woman of caste, cohabiting with several men.

It appeared that the suit was originally instituted by the Respondent in the Court of the Principal *Sudder Ameen* of *Tinnevelly*, praying that a decree might be passed, awarding to him and his heirs, on account of their maintenance, Rs. 8,400 per annum, to be paid from the income of the *Zemindary*. That Court, on the 11th of *November*, 1863, dismissed the suit with costs, whereupon the Respondent appealed to the Civil Court of *Tinnevelly*, which reversed that decision and decreed to the Respondent an annual sum of Rs. 2,500 for maintenance, being the largest sum that Court had jurisdiction to award, which decree was affirmed on appeal by the High Court at *Madras*. The present Petitioner, the *Zemindar* of *Yettiapooram*, applied to that Court for a review of the decree of the 3rd of *January*, 1865, which application was rejected with costs.

No application was made by the Petitioner to the High Court for leave to appeal to Her Majesty in

Council, inasmuch as he was advised that, the judgment being only for Rs. 2,500 (though the real value of the annuity was much beyond that sum, and exceeded Rs. 10,000, the appealable value), applications for leave to appeal had, under similar circumstances, been refused both by the *Sudder* and High Court, on the ground that those Courts were bound by the actual amount of the judgment. The Petitioner, therefore, now applied direct to Her Majesty in Council for special leave to appeal, stating various points of law involved in the suit, which affected the caste, or *status*, of the parties; he, moreover, urged that the suit having been originally brought in the Court of the *Sudder Ameen*, which Court was prohibited from entertaining any suit where the sum at issue exceeded Rs. 2,500, he was precluded from availing himself of important evidence in that Court, or bringing the same before the High Court, and submitting to that Court many questions of fact and law affecting both the *status* and claim of the Plaintiff, and from bringing the same ultimately on appeal before Her Majesty in Council; and he insisted, that it was worthy of the gravest consideration, whether a Plaintiff by instituting a suit in an inferior Court for a sum below the appealable value, Rs. 10,000, to Her Majesty in Council, when the amount at issue was really of much greater value, as in this case, should by such means be enabled to exclude an appeal against a judgment of the High Court, if the case should be carried there.

The Attorney-General (Sir *R. Palmer*, Q.C.), with whom was Mr. *W. W. Mackeson*, for the Petitioner:

This is a very important application. The circum-

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stances disclosed in the petition show abundant grounds for the allowance of the indulgence we ask for. The question at issue involves important points of law, affecting not only the interests of the parties claiming and disputing the right to the annuity sued for, but questions of caste and *status* of the utmost importance in *India*. In the case of *Rogers* v. *Rajendro Dutt* (*a*), though the amount was under the appealable value, this Court gave special leave to appeal on the ground that an important point of law was involved. It did not there appear that any application for leave to appeal had been made to the Court below, the Supreme Court at *Calcutta*. In the cases of *Maharajah Sutteeschunder Roy* v. *Guneschunder* (*b*), *Gooroopersad Knoond* v. *Juggutchunder* (*c*), the principles upon which the Courts in *India* are to estimate the appealable value prescribed by the Order in Council of the 10th of *April*, 1838, were distinctly stated by this Court; in both these cases it was held that where interest was by the decree to be added to the principal sum decreed, and the aggregate amount exceeded Rs. 10,000, the case was within the appealable value, and leave to appeal to Her Majesty in Council was given. But that course could not be followed in this case, because there was nothing to add to the decree which would raise it to the appealable value. In the case of *Sree Mutty Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy* (*d*), an estate, the subject of the suit, was charged with a fixed annual quit-rent of Rs. 64, which the *Sudder* Court decreed with a declaration of the right of the Plaintiff to an enhanced rent of Rs. 822. 13 a. It was held by the Court that the value of the subject-

(*a*) 8 Moore's Ind. App. Cases, 103.
(*b*) *Ib.* 164.
(*c*) 8 Moore's Ind. App. Cases, 166.
(*d*) *Ib.* 165.

matter in suit, in the circumstances, ought to be estimated as amounting to Rs. 10,000; and upon special petition leave was given to appeal. That is exactly our case. The annuity charged by the decree of the High Court upon our *Zemindary*, though of the annual value only of Rs. 2,500, is, in the aggregate, of far greater value than Rs. 10,000, the appealable value under the Order in Council. There is another consideration which ought, we apprehend, to entitle us to the indulgence asked for. The suit was originally instituted in the Court of the *Sudder Ameen;* the jurisdiction of that Court is limited by *Mad.* Reg. III. of 1833, sec. 4, to suits under Rs. 2,500. The appeal from that Court, is to the *Sudder*, now the High Court, but the sum claimed and decreed being under the appealable value from that Court, no appeal can be granted by the High Court to Her Majesty in Council, and thus, though the aggregate amount at issue is far above the appealable value, the suit being really of the value of an annuity of Rs. 2,500, yet by suing but for one year's annuity, and in a Court not having jurisdiction above the sum of Rs. 2,500, the Defendant in the Court below is ultimately precluded from bringing an appeal to Her Majesty in Council, though the decision against him involves not only an amount exceeding in value the requisite sum, but concludes questions of title and law which cannot be satisfactorily raised before the inferior Court or brought before the High Court.

Sir *Hugh Cairns*, Q.C., and Mr. *C. P. Phillips*, opposed the application.

There are no grounds for this application. The question before the Courts below was one of fact and

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not of law; and the only question that can be brought here, if this appeal is allowed, is a question of fact upon the evidence. The facts lie in a very narrow compass, taking them even from the statement for the petition. The Respondent, the Defendant in the original suit, is the *Zemindar* of *Yettiapooram*, inheriting immediately from his brother *Vencataswara*, the last *Zemindar*. In 1854 the Petitioner's mother brought a suit in the Court of the *Sudder Ameen* of *Tinnevelly* against the Respondents, on behalf of her son, to recover possession of a village, part of the *Zemindary*, which she claimed as a gift from *Kumura*, a previous *Zemindar*. This gift was, however, declared void for want of registration, and her claim was defeated. In September, 1863, the Petitioner brought the present suit against the Respondent for an allowance of Rs. 8,400 for maintenance. The defence pleaded was that already stated, and the only issue raised was as to the *status* of the Petitioner's mother and his paternity. No other issue was stated or applied for, and upon that issue the suit was dismissed. On the appeal to the *Sudder* Court the Petitioner raised no objection to the issues, but adduced further evidence of his claim, and no fresh point was raised or insisted on, as was open to him before that Court. The High Court, when the appeal came before them, proceeded on the same grounds. There is, therefore, no pretence for saying that there are important questions of law which could not be raised in the Courts below, and can be determined here. If there had been any decision by the Court of the *Sudder Ameen* contrary to law or usage, it might, and, for aught we know, was brought before the High Court, under the provisions of the Code of 1859, art. viii. ch. x. sec.

372-5. Then, with regard to the sum at issue not being of sufficient value to allow of an application to the High Court for leave to appeal, if the Petitioner is right in his calculation, it was much above Rs. 10,000, and at least the fact of such value ought to have been brought before the High Court, and an application made to that Court for leave to appeal, the omission to make which, under the circumstances, is fatal to this application. The observations regarding the institution of the suit in the Court of the *Sudder Ameen* cannot prevail to the prejudice of the Respondent. The Court of the *Sudder Ameen* was the proper and only Court in which the claim could be made in the first instance, and it is no ground for applying for liberty to appeal here that that Court, which is limited by law to claims of a certain amount, took cognizance, as it was bound to do, of this claim, and rejected it.

The Right Hon. Lord CHELMSFORD :

Their Lordships have had considerable difficulty in coming to a conclusion in this case. They consider, under the peculiar circumstances, that leave to appeal ought to be given. They have no doubt that substantial questions of law are involved in the case, and therefore, upon that ground, if there were no other, their Lordships might be disposed to come immediately to a conclusion in favour of the application now made to them. But the great difficulty of the case arises from the rule with regard to the necessity of applying to the High Court in *India* before coming here for leave to appeal. Some years ago various petitions came before their Lordships asking for leave to appeal where that preliminary form of applying to the Court

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below had not been pursued, upon the ground that the *Sudder* Court had expressed an opinion with regard to the mode of estimating the value of the subject of dispute, confining the parties to the actual sum claimed, and intimating that they would certainly adhere to such estimate; applications were, therefore, made direct to Her Majesty in Council, the Petitioners alleging that they were precluded from applying to the Court below, because in such circumstances that Court would certainly consider the subject-matter under the appealable value of Rs. 10,000.

In the case of *Maharajah Sutteeschunder Roy* v. *Guneschunder*, that was cited from 8 Moore's Ind. App. Cases, 164, which was a judgment given by Lord Justice *Turner*, upon several applications similar to that now before us, their Lordships gave leave to appeal, but they stated that it must be understood in similar circumstances that application ought always to be made to the Court below, and that that Court was bound to give leave to appeal in cases in which the specified amount of Rs. 10,000 could be reached, though only as it there appeared by the addition of interest subsequent to the decree; and it was essential that such an application should be made to the Court below before coming here. Since those decisions, and very recently, an application was made to this Court for leave to appeal, where there had been no previous application to the *Sudder* Court below, and their Lordships expressed very strongly their determination to adhere to the rule so laid down by them, and not to grant leave to appeal in future, unless there had been such previous application made to the Court in *India*, and they refused that application. That decision would of course be binding upon their

Lordships now, and would compel them to say on the present application that, as there had been no application for leave to appeal to the High Court, therefore the Petitioner's application to this Court ought not to be entertained, and no leave given to appeal. But there are very peculiar circumstances in this case. The suit was instituted in the *Sudder Ameen's* Court, which has no jurisdiction in any demand above Rs. 2,500. Supposing that, upon the face of the plaint, it appeared the demand was really beyond the value of Rs. 2,500, it was competent to the Defendant to have pleaded to the jurisdiction of the Court; but no such course was taken, and a decision having been given, and an appeal made to the High Court, both parties proceed on the footing and upon the admission that the sum in dispute is under Rs. 10,000, the appealable amount to Her Majesty in Council.

Supposing, therefore, that an application had been made to the High Court for leave to appeal, it would not have been competent to the parties, in this state of circumstances, to turn round and say that the value was above Rs. 10,000; and if not so, the High Court would have had no power to give leave to appeal.

Therefore, under these very peculiar circumstances, which distinguish this case from those which have been previously determined, their Lordships grant leave to appeal here, reserving of course to the Respondent liberty to apply upon the subject of costs, in case the appeal should not be prosecuted.

NAWAB SIDHEE NUZUR ALLY KHAN - *Appellant,*

AND

RAJAH OOJOODHYARAM KHAN - - *Respondent.**

On appeal from the High Court of Bengal.

28th Nov. 1865.

Application to stay proceedings in a cause in which an appeal from an Order in the nature of an Interlocutory Order is pending before Her Majesty in Council, ought satisfactorily to show that a serious injury will be the result to the party applying, unless the delay asked for be granted, and that the party applying has come promptly to make the application.

Where, therefore, an Appellant from an Order of the High Court of Judicature which remitted a cause, appealed to that Court from the *Zillah* Court, back for the trial of issues framed in accordance with the provisions of Act No. 8, of 1859, s. 139, having failed in obtaining an Order from the High Court to stay proceedings in the *Zillah* Court, pending the appeal, but not having appealed from that decision; presented a petition to Her Majesty in Council praying that all proceedings in the remanded suit might be stayed till the pending appeal had been heard; the Judicial Committee, without determining the question of their right to interfere in such circumstances, held that the Petitioner had not shown any such injury, or used such expedition as entitled him to ask for a stay of proceedings.

Quære, whether, where an Order has been made by the Superior Court below refusing to stay proceedings, and such Order is not specially appealed from, the Judicial Committee have any authority to interfere, though an appeal is pending before them from a previous Order of the Superior Court made in the same suit, remitting the cause back to the inferior Court before which it is pending.

THIS was an application to stay proceedings in a suit instituted in the *Zillah* Court of *Midnapore*, in which an appeal had been interposed from an interlocutory Order, to the *Sudder* Court (afterwards the

* Present:—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

High Court of Judicature) at *Fort William, Bengal,* and by that Court, after a hearing and rehearing, remanded back to the *Zillah* for trial on the merits.

The circumstances as they were stated in the petition of the Appellant, were these: On the 30th of *May,* 1860, a plaint was filed in the Civil Court of *Zillah, Midnapore,* by the Respondent against the Appellant and others to recover possession as mortgagor of certain *Pergunnahs,* therein specified, charging the Appellant and other Defendants with fraud and collusion in obtaining possession of the *Pergunnahs,* and for the sum of Rs. 2,27,000, the alleged mesne profits.

The Defendants put in answers to the plaint, and on the 10th of *November,* 1860, the cause came before the *Zillah* Judge, who framed issues of law and fact in pursuance of the provisions of s. 139, Act No. 8, of 1859. On the 19th of *November,* 1860, the first hearing of the suit took place before the same Judge, who gave judgment on the issues directed, in favour of the Appellants, and dismissed the plaint.

The Respondent appealed from this judgment to the *Sudder* Court at *Calcutta,* and on the 1st of *June,* 1863, the High Court, having been substituted for the *Sudder* Court, reversed the judgment of the *Zillah* Court at *Midnapore* and remanded the suit back to that Court for trial upon the merits.

The Appellant applied for and obtained a rehearing by the High Court, which, on the 12th of *January,* 1864, affirmed its previous judgment and decree: whereupon the Appellant petitioned for and obtained leave to appeal to Her Majesty in Council from such decree and judgment. The Appellant, in his petition to the High Court for leave to appeal against the before-mentioned decree and judgment,

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prayed that until his appeal (for leave to present which he was then petitioning) should be heard, or decided, or until the further order of the High Court, all further proceedings in the High Court and in the *Zillah* Court of *Midnapore* should be stayed; and on the 16th of *June* obtained an order *nisi* calling on the Respondent to show cause why the hearing of the suit under the aforesaid order of remand should not be postponed, pending the result of the appeal to Her Majesty in Council, which Order, on cause being shown, was discharged on the 25th of *August*, 1865. No appeal was asked for or interposed from this Order of dismissal, but the Appellant, believing, as he stated in his petition, that he would be put to great trouble and inconvenience, and would be forced to incur great expense in and about obtaining the evidence, which he had been advised and believed, would be necessary to give on his behalf at the trial, and being advised and believing that the determination by the trial of the issues in fact raised in the suit would be wholly immaterial as regarded the result of the suit, if he succeeded in his appeal to Her Majesty in Council, which he had been advised and believed he should do, and believing that the trial of the remanded suit would be proceeded with in the *Zillah* Court, pending the hearing of his appeal, presented a petition to Her Majesty in Council, praying that an early day might be appointed for the hearing of the appeal, and that all proceedings in the remanded suit might be stayed until the pending appeal should have been heard and decided.

The Attorney-General (Sir *R. Palmer*) with whom was Mr. *A. Stevenson*, now moved to stay proceedings.

It is necessary to state shortly the facts of this case.

The suit is one for possession by redemption of certain mortgaged *Pergunnahs* which have been sold at a sale purporting to have been a revenue sale, which, as we say, by reason of collusion and fraud, was a fictitious sale. We claim to redeem these *Pergunnahs*, and for an account of mesne profits. The sale is alleged to have been for Government arrears of revenue, which we say were purposely allowed to fall in arrear, and the sale, instead of being a public, was, by the fraud and collusion of the parties, really a private one. It was urged against us that we were barred by the *Ben.* Regulation of Limitations, III. of 1793, sec. 14; but as we allege fraud and collusion, we claim exemption from that Regulation, and insist on our right to come in under cls. 1, 3, sec. 3, Reg. II. of 1805, which allows sixty years to bring an action. The issues directed by the *Zillah* Judge go directly to these points, and if determined on the appeal in our favour, will dispose of the case; that, therefore, is a reason sufficient to induce this Court to stay the proceedings below. The issues of fact, moreover, if found against us at the trial, would, on the points there stated, exclude us from any benefit we may derive from a decision in our favour on the appeal. We only ask that the trial may be postponed till the appeal has been heard; we are ready to proceed with the appeal immediately.

Mr. *Rolt*, Q.C., and Mr. *Leith*, opposed.

This is an unprecedented application. It is quite irregular for the other side to go into the facts or merits of the case. Neither is this Court, nor are we ourselves, sufficiently informed of the facts to come to any conclusion. We know nothing of the merits, and this Court has no materials before it to enable

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your Lordships to say on what grounds you could order a stay of the proceedings. What claim has the Appellant to such an indulgence? The decree of foreclosure which is now sought indirectly to impeach was pronounced so long ago as on the 16th of *November*, 1852, there was no appeal from that judgment, and the present proceedings are long subsequent. Even admitting the dates as stated by the Appellant in his petition, the final judgment on the rehearing was pronounced on the 12th of *January*, 1864, and though appealed, the appeal was not prosecuted; nor was the Order *nisi* which is now sought to be incorporated as part of the proceedings applied for, or obtained before *June* in the same year; there has been no diligence, therefore, if that could be urged as a ground for granting this application. But the consequences to the Respondent, if the proceedings are stayed, may be most unjust and injurious. Evidence both oral and documentary may be lost, witnesses may die, and all the other casualties that impede a cause may intervene. There is, moreover, a fatal objection, as we apprehend, to the application. It is an appeal against an Order of the High Court which discharged the Order *nisi* of the 16th of *June*, 1864, from which no appeal was either asked for or asserted. The only appeal pending in this Court is from the decree of the 1st of *June*, 1863, confirmed by the judgment of the 12th of *January*, 1864, and we submit that independent of the want of merits, this Court has no jurisdiction to review an order not appealed from.

The Right Hon. Lord CHELMSFORD:

Their Lordships have not entered into the consideration of the merits of this case, nor will they

decide any question with regard to the right or authority which they may have to interfere by ordering a stay of proceedings in the circumstances of these cases; but they decide upon this petition entirely upon these grounds: that any application for a stay of proceedings must be founded upon two points, which are essential to sustain the application: first, that a serious injury will be the result to the party applying unless the stay of proceedings is granted, and secondly, that the party has come promptly to make the application for delay.

Now, with regard to any suggested injury which may arise to the Petitioner in case the delay asked for is not granted, there is no ground whatever for supposing that any such injury will be sustained. All that he can allege is, that he may be put to costs upon the trial of these issues of fact remitted to the *Zillah* Court, supposing ultimately the decision of their Lordships on the appeal now pending in this Court should be in his favour, upon the questions of law which it is said are raised therein. But the answer to that objection, if it be one, is, that if the Petitioner is put to costs improperly, those costs will ultimately fall on the Respondent; while, on the other hand, the situation in which the Respondent would be placed, if their Lordships were to grant this application, must be considered, because there might be very great danger of his losing evidence, parol and documentary, if the delay asked for were granted. Therefore, with respect to any supposed injury which would arise from the cause being allowed to take its course, and the issues of fact allowed to be tried in due form in the *Zillah* Court of *Midnapore*, there is no pretence for saying that any such injury will arise.

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Then, has the Petitioner come promptly with his application? which is another essential requisite of an application for delay or, for a stay of proceedings in any case.

The appeal to the High Court of Judicature was decided finally on the 12th of *January*, 1864; and on the 10th of *February*, 1864, there was a petition for leave to appeal, and no application to stay proceedings made till the month of *June*, 1865. The delay was endeavoured to be accounted for from the Respondent having objected to the leave to appeal, on the ground that the six months ought to be dated from the date of the original decree, and not from the order on review; but that really appears to their Lordships to be no explanation at all, at least no satisfactory explanation of the delay which has taken place, of sixteen or eighteen months before this application to stay proceedings is made.

Under these circumstances, there being no proof of any serious injury which would be sustained by the Petitioner, by their Lordships, supposing they have the power to interfere, not interfering to stay proceedings, and on the other hand, the Petitioner not having come, as rightly and properly he ought to have done, promptly with this application to stay the proceedings below, their Lordships think this petition ought to be dismissed, and with costs (*a*).

(*a*) See upon this point, Rajah Perladh Sein *v.* Baboo Bhoodoo Singh, 10 Moore's Ind. App. Cases, 78.

MAHARANEE INDERJEET KOOAR - *Appellant,*

AND

MUSSUMATH ISMUDH KOONWUR AND SOONNETT KOONWUR - - } *Respondents.**

On appeal from the Sudder Dewanny Adawlut at Calcutta.

30th Nov., & 1st Dec. 1865.

THE facts of the case are sufficiently stated in the judgment.

As the Respondents did not appear, the appeal was heard *ex parte,* and was argued by

Mr. *Rolt,* Q.C., and Mr. *W. H. Melvill,* for the Appellant.

By a *Razinamah* executed in the year 1824, a compromise of a suit was entered into, whereby the respective rights of *A.* & *B.* in their father's (*C.'s*) real and personal estate were declared. *C.* was entitled to a tax levied on Pilgrims resorting to a Temple situate on his estate. This tax was abolished by Government in the year 1840, and a perpetual annual money payment awarded by the Government to *C.* as compensation. On the death of *C.* a partition of his estate was made between *A.* & *B.*, by assigning to each certain *Mehals* according to their supposed value, in respect of their proportions of the shares provided by the *Razinamah* of 1824. This partition did not include the compensation for the pilgrim tax. Government in dealing with the annual compensation-money deducted the amount from the *jumma* paid by *A.* & *B.* for the *Mehals,* which led to disputes as to the value of the *Mehals* so taxed and apportioned between *A.* & *B.* Held (1), that the annual compensation-tax was to be treated as part of the assets of *C.*, and to be received by *A.* & *B.*, in the proportions agreed to by the *Razinamah;* and (2), that the mode of remission by Government from the *jumma,* in respect of the *Mehals,* by the appropriation of the compensation-money, did not affect the rights of the parties.

* Present:—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

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Their Lordships' judgment was pronounced by

The Right Hon. Lord CHELMSFORD:

This is an appeal from four decrees of the *Sudder* Court of *Calcutta*, reversing four decrees of the Principal *Sudder Ameen* of *Zillah Behar* in favour of *Maharajah Hetnarain Singh*, whose widow and heiress is the Appellant. The Respondents are the widows and heiresses of the late *Modnarain Singh*, who was the brother of *Hetnarain Singh*, and the Plaintiff in one and Defendant in three of the suits in which the decrees now under appeal were made.

The four suits involved the same question, which is shortly and accurately stated in the Appellant's case as follows:—

"Whether *Hetnarain Singh* and *Modnarain Singh* were entitled to the annual sum of Rs. 17,212 9a. 5p., in the proportions of $\frac{9}{16}$ths and $\frac{7}{16}$ths respectively, in accordance with the contention of *Hetnarain Singh*, or in the proportions of the amounts of *sudder jumma* payable by them respectively on account of the nineteen *Mehals* in the pleadings mentioned in accordance with the contention of *Modnarain Singh*."

The two brothers were sons of the *Maharajah Mitterjeet Singh*, who died on the 3rd of *October*, 1840. During the lifetime of the *Maharajah* an agreement was entered into for a division of the property between his two sons after his death. The particulars of this agreement are stated in a former suit between the brothers, which was brought by appeal before their Lordships and is reported in Moore's Ind. App. Cases, Vol. 7, p. 312, to this effect:—"Family dissensions having arisen during the lifetime of *Mitterjeet Singh*, certain proceedings

were instituted, and on an appeal to the *Sudder Dewanny Adawlut* in a suit in which *Mitterjeet Singh* and the Appellant and Respondent were parties, a compromise was entered into and a *Razinamah* and *Ikrarnamah*, dated the 7th of *February*, 1824, was filed by *Mitterjeet Singh*, which instrument was to the effect, that the real and personal estates held by him after his death were to be divided between the Appellant and the Respondent. The former was to take a 9 *annas* share and the latter a 7 *annas* share. Partition deeds of the same tenor were also filed, and on the 4th of *March*, 1824, the *Sudder* Court decreed that the parties should act up to the terms entered into by them in the above-mentioned instruments."

The *Maharajah* was entitled to a tax levied upon Pilgrims resorting to the Temple at *Gya*. This tax was abolished by the Government in the month of *January*, 1840, and a compensation was awarded to the *Maharajah* in lieu of it in the shape of a perpetual annual payment of Rs. 17,212. 9a. 5p. The grant of this compensation was the subject of a Government letter of the 16th *January*, 1840, which, unfortunately, is not printed in the proceedings.

On the death of the *Maharajah*, his property, whether moveable or immoveable, had to be divided between the sons according to the proportions of nine-sixteenths and seven-sixteenths, settled by the agreement and decree of 1824. And the compensation tax, as part of that property, was divisible in these proportions. His immoveable property, which was very extensive, consisted partly of nineteen *Mehals* which were held by him in severalty, and partly of *Mehals* which he held conjointly with other persons.

Disputes arose between his sons immediately.

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after his death. The Commissioner of the District intervened and induced them to make a partition of the immoveable property. Under his advice, and with his approbation, deeds of partition were executed on the 30th of *December*, 1840, and that which was executed by *Modnarain* specifies the different villages which fell to the lot of *Hetnarain* and *Modnarain* respectively; and also the sums which each, as between him and his brother, was bound to pay in respect of the *Sudder jumma*, or Government revenue. The partition, however, was not made upon the principle of dividing each *Mehal*, with the burthen of the public revenue assessed thereon, in the proper proportions, but of assigning certain villages and parcels according to their real or supposed value to each share, so as to give to *Hetnarain* nine-sixteenths in value, and to *Modnarain* seven-sixteenths in value of the whole immoveable property. In consequence of this mode of division, in six out of the nineteen *Mehals* which had been held by *Mitterjeet Singh* in severalty, *Modnarain* took more than a nine *annas* share (his share in some of them being absolutely much larger than that of his brother), with the liability of having to pay a corresponding share of the public revenue assessed on those *Mehals*. This deed of partition, which was confined to immoveable property, made no mention of the compensation for the Pilgrims' tax; and the *jumma*, or revenue, stated therein to be chargeable on the different *Mehals*, and to be apportioned between the brothers as therein mentioned, was the full amount of *jumma* assessed upon them under the perpetual Settlement. It follows, then, that as far as this partition went, the compen-

sation for the Pilgrims' tax was not included therein, and presumably continued to be part of the assets of *Mitterjeet Singh* divisible between his sons in the proportion of nine to seven *annas*.

In *Mitterjeet Singh's* lifetime the payment of this annuity would have been very simple; he had annually to pay a very large sum (upwards of three lacs of Rupees) for Government revenue, and would naturally have retained the Rs. 17,212 by way of deduction or set-off. It would seem, however, that in his lifetime, or very shortly after his death, the Revenue authorities of the District entertained the notion of putting, in some way or other, this payment against the *Sudder jumma*, in respect of the nineteen *Mehals* held by him in severalty, distributing the whole sum of Rs. 17,212 amongst the different *Mehals* according to the *jumma* assessed upon them respectively. This appears from the letter of the Accountant of the Revenue department, which purports to be in answer to a letter from the Collector of the 22nd *October*, 1840, which is not in evidence. The Accountant's letter is dated the 26th *December*, 1840, and is in these terms: "I have the honour to acknowledge the receipt of your letter, No. 344 of the 22nd *October* last, and with reference to the seventh paragraph thereof, I beg to acquaint you that on examining the items rateably distributed by you among the several *Mehals* in your statement, trifling errors have been discovered to exist in almost every item. I accordingly transmit herewith a copy of your statement with an additional column added to it, showing the calculations made in this office, agreeably to which you will have the goodness to allow the remissions in favour of the several *Mehals*. I have

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used the term remissions, though, as far as the course of entry is concerned, which the settlement with the *Rajah* will render necessary, no remissions in account will appear; for the compensation in question to the *Rajah's* heirs you will be pleased to recollect will have to be charged under the head of *sayer* compensation, subordinate to pensions, the charge being balanced by a distinct credit *per contra* 'to land revenue' (the estates being in your District, *Towjee*). This course of entry you will observe will prevent you from exhibiting the transaction in account as a 'remission.'"

By a proceeding, dated the 23rd of *March*, 1841, the Collector directed that effect should be given to the letter of the Accountant, and that the Rs. 17,212. 9a. 5p., should be credited on the 1st of *April* of the current, and of every future year, to the *Mouzahs* of each lot, as was specified in the letter of the Accountant, that is, on the list of *Mehals* annexed to it; but it appears that in *April*, 1841, and again on the 31st of *March*, 1842, a warrant was written for the whole sum of Rs. 17,212. 9a. 5p., and this settlement of accounts was, therefore, in the nature of a set-off of one independent demand against another, and did not imply the permanent remission or deduction of part of the *jumma* originally assessed on the several *Mehals*.

On the 6th of *June*, 1842, the Secretary of the Government wrote to the Accountant that the remission of the Rs. 17,212. 9a. 5p. was to be adjusted by reduction of the *jumma*. The letter is in the following terms:—"With reference to the communication made to your office from this Department under date the 16th of *January*, 1840, I am directed to inform you that the Honourable the Deputy-Governor

of *Bengal* has this day been pleased to determine that the remission granted to *Rajah Mitterjeet Singh* shall be adjusted by a reduction of the *Sudder jummas* of the estates, recorded in his name on the *Behar* Collector's *Towjee*." And a letter to this effect, of the date of 14th of *June*, 1842, was sent to the Collector of *Behar*. Whether that Court was right in this statement, their Lordships, not having the letter of the 16th of *January* before them, are unable to determine.

This order of *June*, 1842, for adjusting the remission by a reduction of the *jumma*, apparently rendered a change in the mode of stating the accounts necessary; but, in fact, no alteration was made in them down to the year 1850. This appears from a letter to the Collector of *Behar* of the 17th of *September*, 1850. Part of that letter is in these terms: "As regards the mode of adjusting the remission still observed by you, I beg to remark that instructions from this office based upon the orders of Government of the 6th of *June*, 1842, were, under date the 14th *idem*, issued to you, wherein you were requested to account for the remission by a reduction of the *Sudder jumma* of the estates recorded in the name of *Rajah Mitterjeet Singh* on the *Towjee* of your District, which instructions apparently set aside those contained in letter, No. 426 of the 26th *December*, 1840. It would seem that after this communication the Government accounts were kept in accordance with the Government letter of the 6th of *June*, 1842, which is obviously treated as having introduced a mode of accounting for the compensation for the Pilgrims' tax differing from that established by the Accountant's letter of the 26th of

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December, 1840, in that it proceeded less upon the principle of set-off, and more directly upon that of remission of revenue. Assuming, however, that the order so to deal with the compensation was within the competence of Government, as a direction to their Officers for the more convenient mode of keeping their accounts, or otherwise, how could that affect the rights of *Hetnarain Singh* and *Modnarain Singh*, *inter se?*

The Government might keep their accounts in any manner they pleased, but the Rs. 17,212, would still continue to be the property of the brothers in the settled proportions, unless they acquiesced in the course adopted by the Government, and acted upon it in such a way as to indicate a fresh agreement between them. Now, there is no evidence that *Hetnarain Singh* ever assented to this arrangement, or that he ever agreed to alter the proportions in which the property was originally divided. On the contrary, on the 15th of *April*, 1843 (and no action can have been taken on the letter of *June*, 1842, until the 1st of *April*, 1843), he presented a petition to the Collector, in which he complained of his being called upon to pay a larger sum than was due from him for the *jumma*, and praying relief. That petition was rejected. He then appealed to the Commissioner, and the Commissioner, in refusing to interfere, said: "It appears that the *Malikanah* allowance has been rateably credited to the revenue of the *Mehals* of both the parties. If there is a diminution in their respective shares as opposed to the fixed allotment of share, let them adjust the differences among themselves; Government has nothing to do with this. The Collector is to communicate this to both the parties."

Accordingly, from the date of this order until the commencement of these suits in 1853, *Hetnarain Singh* continued to assert his right to nine-sixteenths of the Rs. 17,212. 9a. 5p., by retaining so far as he could, out of the sums which under the partition he was bound to pay as his share of the *jumma* assessed in the different *Mehals*, his proportion of the remission allowed in respect of each particular *Mehal*. The suit of *Modnarain Singh* is brought to recover the sums which, according to his contention, were in this manner improperly retained by *Hetnarain Singh* in satisfaction of his full proportion of the remissions allowed in respect of three of the *Mehals*, whilst the three suits of *Hetnarain Singh* are for the recovery from *Modnarain Singh* of the differences between the sums actually returned by him, and his full nine-sixteenths of the remissions allowed in respect of three other *Mehals*. The deed of partition, as has already been shown, made no alteration in the original rights of the parties, and the observations of the Principal *Sudder Ameen* in this respect are perfectly correct. It is to be observed also that *Modnarain Singh*, in his plaint filed on the 8th of *April*, 1853, as to the three *Mehals* of which *Hetnarain Singh* had received his nine-sixteenths, does not found himself upon any new agreement between them, but upon the authority of the Government order of *June*, 1842. The ground upon which the *Sudder* Court proceeded in overruling the decree of the Principal *Sudder Ameen* in the Appellant's favour was, that the parties were aware that the remission of the *jumma* had been made, and that there was a deduction from certain specified *Mehàls*, and that the amount of remission from each of these *Mehals* had been ascertained and

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determined, and that it was, therefore, a reasonable inference from the silence of the deed of partition on the subject, that the parties believed and were willing, that the amount of remission on each estate, should be apportioned to the amount of *jumma*, for which each of the contracting parties was responsible. There is, however, not the slightest proof that when the deed of partition was in preparation (the consent to an amicable adjustment in which it resulted having been given on the 24th of *December*, 1840), or even at the time of the execution of the instrument on the 30th of *December*, 1840, the parties were aware of the mode in which the Government accounts had at that time been made out. The letter of the Revenue Accountant of the 26th of *December*, 1840, can hardly have reached the Collectorate of *Behar* before the 30th of *December*, and the proceeding of the Deputy-Collector shows that that letter was not taken into consideration by him until the 4th of *January*, 1841, and that no final orders were passed thereon until the 23rd of *March*, 1841. But even if the parties at the time when the deeds of partition were executed, had known of the letter of the 26th of *December*, 1840, they would have had no notice of the determination on the part of the Government to settle the account by way of reduction or remission of *jumma*. The arrangement was effected by the letter of Government of the 6th of *June*, 1842, and it is treated throughout the proceedings as differing materially from that contemplated in the letter of *December*, 1840. It is in the letter of 1842 that *Modnarain Singh* in his plaint founds his claim, and the sums which he sought to recover were those retained by *Hetnarain Singh* after the date of it.

The *Sudder* Court puts the case of the sale for arrears of revenue of one of the lots on which a reduction of *jumma* had been allowed, and the danger of the Government revenue suffering from a doubt, whether the parties would consider themselves obliged to give up so much of a remission which they now enjoy, or would expect the Government to submit to the loss of revenue, consequent on treating the *jumma* on the *Mehal* as permanently reduced by the amount of the remission now allowed. But it is difficult to understand how, because in a supposable case the Government may be thrown into a state of uncertainty with respect to the mode of dealing with the reduction, this can have any influence on the rights of the parties between themselves.

Their Lordships are of opinion, that the view of the case taken by the *Sudder* Court cannot be adopted, but that the Rs. 17,212, was divisible between the brothers in the proportion of nine-sixteenths and seven-sixteenths, and that, in whatever mode the Government may think proper to deal with this sum with reference to the *jumma*, the rights of the parties cannot be affected without their consent, but will continue to be adjusted according to the proportions originally established.

Their Lordships will, therefore, humbly recommend Her Majesty to reverse the decrees of the *Sudder* Court in all the four suits, and to affirm the decrees of the *Sudder Ameen* in all those suits, with costs of the Court below and here.

ALEXANDER JOHN FORBES - - *Appellant;*

AND

AMEEROONISSA BEGUM - - - *Respondent.**

On appeal from the High Court at Calcutta.

7th, 8th, & 9th Dec. 1865.

The law under the *Bengal* Regulations, and practice of the native Courts, in foreclosure proceedings, reviewed and considered.

Anterior to the year 1806, the rights of a holder of a *Bye-bil-wuffa* (Conditional sale), were

THIS was a suit brought by the Appellant, a Mortgagee, for possession of a *Talook* and other real estates, which had been mortgaged to him by deeds of absolute sale and defeazance, constituting a *Bye-bil-wuffa*, or Conditional sale in the nature of a mortgage. The acting Judge of the Court of *Zillah Purneah* dismissed the suit, on the ground that the Mortgagee had failed to file and swear to accounts of his gross receipts

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir John Taylor Coleridge, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

enforceable according to the strict terms of the agreement. It was then necessary to pay the amount when due. By *Ben.* Reg. XVII. of 1806, a modification of this strict rule of the rights given to the holder of such a contract was introduced. The 7th section gives the Mortgagor a right of redemption within one year after an application by the Mortgagee to the Court under the 8th section of that Regulation. After such an application the Mortgagor must either pay or tender the money lent, or the balance then due, if any part of the principal has been discharged, and if the Mortgagee has not been in possession, any interest that may be due, or he must make a deposit pursuant to *Ben.* Reg. I. of 1798, sec. 2.

The general effect of these Regulations is, that if anything be due on the mortgage, and the Mortgagor make no deposit, or an insufficient one, the right of redemption is gone at the expiration of the year of grace. But the title of the Mortgagee is not completed, he must bring

from the estates mortgaged and also of his expenditure for the management of it, while he was in possession as Mortgagee, and had the usufruct of the mortgaged estates according to the provisions of *Ben.* Regs. XV. of 1793, sec. 11, and I. of 1793, sec. 3; and that consequently the Court could not adjust the accounts between the parties and ascertain whether the mortgage loan and interest had or had not been liquidated from the rents and profits received by the Mortgagee within the prescribed time limited by the *Bengal* Regulations. The High Court at *Calcutta* affirmed this decree. Hence the present appeal.

The principal question raised by the appeal was, whether the proceedings taken by the Appellant under *Ben.* Regs. XV. of 1793, and XVII. of 1806, for the purpose of foreclosing the mortgage were regular.

In the Courts in *India* the Appellant contended that

a suit to recover possession, if he is out of possession, or obtain a declaration by the Court of his title if he is in possession, and in that suit the Mortgagor may contest the validity of the Conditional sale, or the regularity of the proceedings taken under Regulation XVII. of 1806, in order to make it absolute, or he may prove that nothing is due, or that the deposit is sufficient to cover what is due; but the issue, so far as the right of redemption is concerned, will be whether anything remained due to the Mortgagee at the end of the year of grace, and if so, whether the necessary deposit had been made. If that is found against the Mortgagor, the right of redemption is gone.

Held, upon the construction of sec. 11, *Ben.* Reg. XV. of 1793, that the production of accounts by a Mortgagee in possession seeking to foreclose cannot be called for when there is neither plea nor proof that the usufruct had liquidated the principal and interest, and where no deposit had been made to cover the balance admitted to be due.

The necessity for a Mortgagee in possession to produce his accounts arises:—

First, when the Mortgagor has deposited the principal money, leaving the question of interest to be settled by an adjustment of the account.

Secondly, when the Mortgagor has deposited all that he admits, or alleges, to be due; and

Thirdly, when he pleads and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the mortgaged premises.

It is not necessary to appeal from an Interlocutory Order which does not dispose of the cause. Such Order can be impeached on appeal from the final decree.

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he was not obliged to produce such account, first, because the lands mortgaged to him were not in his possession, but in that of his son, under a lease from the Mortgagor and a *Kabooleat* (counter lease) bearing even date with the mortgage deeds executed by the latter, and secondly, because he had only received as Mortgagee, under an assignment from the Mortgagor, the rent agreed to be paid by his son under the *Kabooleat,* in liquidation of interest, and that he had complied with the requirements of the Regulations by filing an account of the amounts received by him, from time to time, in respect of such rent.

The *Bengal* Regulations bearing upon these points are these:

By section XI. of Reg. XV. of 1793, it is enacted, that "For the adjustment of the accounts, in the cases of mortgages specified in section 10, where the Mortgagee shall have had the usufruct of the mortgaged property, the Mortgagee is to be required to deliver in the accounts of his gross receipts from the property mortgaged, and also of his expenditures for the management or preservation of it. The Mortgagee is to swear, or (if he be of the description of persons whom the Courts are empowered to exempt from taking oaths) to subscribe, a solemn declaration, that the accounts which he may deliver in are true and authentic. The Mortgagor is to be permitted to examine the accounts, and, after hearing any objections he may have to offer, or any evidence that either party may have to adduce respecting them, the Court is to adjust the account."

Section III. of Reg. I., 1798, enacts that, "In all instances wherein the lender on a *Bye-bil-wuffa*, or

similar Conditional sale, may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account to the borrower for the proceeds of the estate whilst in his possession, on the principles prescribed with regard to mortgages and interest in Regulation XV., 1793, as far as the same may be applicable to the nature of the case. But such part of section X. of the above Regulation, as directs that the mortgages therein referred to, are to be considered as cancelled and redeemed, whenever the principal sum, with the simple interest due upon it, shall have been realized from the usufruct of the mortgaged property, or otherwise liquidated by the Mortgagee, being inapplicable to the Conditional sales referred to in this Regulation, it is hereby declared not to apply thereto."

The course to be pursued with a view to the redemption or foreclosure of mortgages and Conditional sales is prescribed by Regulation XVII. of 1806, sec. 7. In addition to the provisions made in the Provinces of *Bengal*, *Behar*, *Orissa*, and *Benares*, by Regulation I., 17 9 , and in the Ceded and Conquered Provinces by Regulation XXXIV., 1803, for the redemption of mortgages and Conditional sales of land, under deeds of *Bye-bil-wuffa*, *Kutcubaleh*, or any similar designation, it is thereby provided, "that when the Mortgagee may have obtained possession of the land, on execution of the mortgage deed, or at any time before a final foreclosure of the mortgage, the payment or established tender of the sum lent under any such deed or mortgage and Conditional sale, or of the balance due if any part of the principal amount shall have been discharged; or when the Mortgagee may not

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have been put in possession of the mortgaged property, the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor and owner of such property, or his legal representative, to the redemption of his property before the mortgage is finally foreclosed in the manner provided for by the following section; that is to say, at any time within one year (*Bengal, Fusily,* or *Willaity,* according to the era current where the mortgage may take place) from and after the application of the Mortgagee to the *Zillah* or City Court of *Dewanny Adawlut* for foreclosing the mortgage and rendering the sale conclusive in conformity with section 8, of this Regulation. Provided that such payment or tender be clearly proved to have been made to the lender and Mortgagee or his legal representative; or that the amount due be deposited within the time above specified, in the *Dewanny Adawlut* of the *Zillah* or City in which the mortgaged property may be situated, as allowed for the security of the borrower and Mortgagor in such cases, by section 2, Regulation, I. 1798, and section 12, Regulation XXXIV., 1803, the whole provisions contained in which sections, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year, granted for an equitable right of redemption by this Regulation."

The Section VIII. of the same Regulation enacts, "Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent

before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself, or by one of the authorized *Vakeels* of the Court to the Judge of the *Zillah* or City in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the Mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it; and shall at the same time notify to him, by a *Perwannah* under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section, within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive."

The general facts of the case sufficiently appear in their Lordships' judgment.

The Attorney-General (Sir *R. Palmer*, Q.C.), and Mr. *W. H. Melvill*, for the Appellant:—

Contended, first, that as the mortgage had been foreclosed, and the sale to the Appellant had become absolute prior to the institution of the suit, the Appellant was entitled, as of course, to a decree for possession of the mortgaged estates; and secondly, that, under *Ben.* Reg. I. of 1793, sec. 3, it was not necessary for him as mortgagee to produce an account to entitle him to a decree for possession after foreclosure had taken place, under *Ben.* Reg. XVII. of 1806, secs. 1, 7 and 8.

Mr. *Rolt*, Q.C., and Mr. *Leith*, for the Respondent:—

Submitted first, that the decree appealed from was

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right, and that the Appellant was properly declared by the decree of the *Zillah* Judge to have been in possession and enjoyment of the usufruct of the lands mortgaged to him; and secondly, that he had failed to file attested accounts of his gross receipts and expenditure as mortgagee in possession, as required by *Ben.* Reg. XV. of 1793, secs. 2, 8, 9, 10.

The authorities referred to in respect to the above points were, 7 N. W. S. D. A. Rep. pp. 60, 65, 68, (1852); 10 *ib.* p. 580 (1855); 7 *Ben.* S. D. A. Rep. p. 92; *ib.* p. 506 (1857); *ib.* p. 131 (1859); *ib.* p. 320 (1856); *ib.* p. 727 (1858); *ib.* pp. 492-4 (1859); Circular Order, 22nd *July*, 1813, No 37.

As to the necessity of appealing from an interlocutory decree, which it was insisted could be opened on appeal from the final decree, *Maharajah Moheshur Sing* v. *The Bengal Government* (*a*) was cited.

1st Feb. 1866.

Their Lordships' judgment was delivered by

The Right Hon. SIR JAMES W. COLVILE.

On the 13th of *March*, 1850, *Shah Ally Reza*, the late husband of the present Respondent, executed an instrument which, upon the face of it, purported to be an absolute Bill of sale of the *Talook* and lands therein described to the Appellant, in consideration of the sum of Rs. 39,500. On the same day the Appellant executed to *Shah Ally Reza* an *Ikrah*, or agreement, importing that on payment of the sum of Rs. 39,500 with interest at 12 *per centum per annum* on the 13th of *March*, 1851, the sale should be void; but that in the event of the seller's not paying the principal and interest according to his engagement, the *Ikrah* was to

(*a*) 7 Moore's Ind. App. Cases 283; and see upon this point Jones *v.* Gough, 3 Moore's P. C. Cases, N. S., p. 12, where the cases on this point are collected.

be null and void, and the purchaser (the Appellant) was to become the absolute proprietor of the property.

The effect of these two instruments was simply to secure the repayment of the sums lent by the Appellant to *Shah Ally Reza* with interest on the day named, by means of that kind of mortgage which is known in *India* as *Bye-bil-wuffa*, or Conditional sale.

The transaction between the parties, however, included something more. On the 12th of *March*, the day before the date of the Bill of sale, *Shah Ally Reza* had granted a lease of the mortgaged premises for three years ostensibly to Mr. *Alexander Demetrius Forbes*, the son of the Appellant, and had taken the corresponding *Kabooleat* from him.

The latter shows that the lessee had bound himself, after paying the Government revenue and other charges on the lands, to pay to the lessor by way of rent for the *Bengali* year 1258, the sum of Rs. 2,000; for the year 1259, Rs. 2,332. 9a. 6p.; and for the year 1260, Rs. 2,399. 2a. 6p.

And, it appears on the face of the *Ikrah*, that *Shah Ally Reza* had given an order to the lessee to pay by instalments out of this rent to the Appellant the sum of Rs. 2,101, in part satisfaction of Rs. 4,740, which would become due on the 13th of *March*, 1851, for one year's interest on the Rs. 39,500.

It has been proved as a fact, and is not now disputed, that the grant of this beneficial lease was, what is called in *India*, a *Benamee* transaction; that though taken in the name of his son, it was really a lease to the Appellant, who under colour of it obtained possession of the mortgaged premises.

In *April*, 1851, the time fixed for the repayment of the mortgage money having expired, the Appellant.

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commenced the proceedings which must be taken in order to foreclose a mortgage of this kind, and make the Conditional sale absolute.

And the question on this appeal is, whether these proceedings have been effectual, or whether his suit has been properly dismissed by the decree of the *Zillah* Judge, confirmed by that of the *Sudder Dewanny Adawlut.*

So many points touching the regularity of these proceedings have been raised at the Bar that it is desirable before going further to state what, in their Lordships' apprehension, the law of foreclosure as established by the Regulations and the practice of the Courts in *Bengal*, is.

Up to the year 1806, the rights of the holder of a *Bye-bil-wuffa* were enforceable according to the strict terms of the contract. It was necessary for the Mortgagee, if he wished to save his estate from forfeiture, to tender the amount due, or to pay it into Court, pursuant to the provisions of Regulation I. of 1798, within the stipulated period for the repayment of the loan.

Regulation XVII. of 1806, first introduced a modification of the strict rights given by the contract analogous to, though by no means identical with, that which Courts of Equity have long imposed on mortgages in this country. The 7th section of that Regulation extended the period within which the Mortgagor might redeem, to any time within one year from and after the application of the Mortgagee to the *Zillah* Court under the following section; the 8th, which provides that a Mortgagee desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or

at any time subsequent before the sum lent was repaid, should, after demanding payment from the borrower, or his representatives, apply for that purpose by a written petition to the *Zillah* Judge, who should cause the Mortgagor to be furnished with a copy of the application, and notify to him that if he did not redeem the property in the manner provided by the preceding section, within one year from the date of the notification, the mortgage would be finally foreclosed, and the Conditional sale made absolute.

Hence, when these proceedings have been had, it becomes incumbent on the Mortgagor to take within the year the steps towards redemption which are prescribed by the 7th section.

Within that period he must either pay or tender (and the proof of such payment or tender will lie on him) the sum lent, or the balance due if any part of the principal has been discharged, and also in the case in which the Mortgagee has not been put into possession of the mortgaged property, any interest that may be due; or (and this is the alternative commonly adopted) he must make a deposit pursuant to section 2 of Regulation I. of 1798.

That enactment, of which the object was to relieve Mortgagors seeking to redeem, from the difficulties of proving a tender, by enabling them to pay the proper amount into Court, thus prescribes what the deposit is to be. "When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent, with the stipulated interest thereon; but if the lender has held possession of the land, the principal sum borrowed only need be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has-

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been in possession." In either of these cases the deposit preserves to the borrower his full right of redemption and entitles him to immediate possession of the land, if it is in the possession of the lender, subject to the adjustment of the accounts. A third case is then provided for as follows:—"If the borrower in any case shall deposit a less sum than above required, alleging that the sum so deposited is the total amount due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed; and if the amount so deposited be admitted by the lender, or be established on investigation, to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not, however, in such cases be entitled to the recovery of the lands, until it be admitted or established that he has paid the full amount due from him." The 3rd section prescribes the manner in which the lender is to account in those cases in which an account shall be necessary.

The general effect of these Regulations is, that if anything be due on the mortgage and the Mortgagor makes an insufficient deposit, and *à fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the Mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd of *July*, 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Regulation XVII. of 1806, sec. 8, are purely ministerial, and that a Mortgagee, after having done all that this Regulation requires to be done in order to foreclose

the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession.

In that suit the Mortgagor may contest on any sufficient grounds the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made is sufficient to cover what is due; but the issue in so far as the right of redemption is concerned, will be whether anything at the end of the year of grace remained due to the Mortgagee, and if so, whether the necessary deposit had been then made. If that be found against the Mortgagor the right of redemption is gone.

It has been stated that the Appellant commenced his proceedings to foreclose under Regulation XVII. of 1806, the 5th of *April*, 1851.

On the 31st of *August*, 1852, the Principal *Sudder Ameen* of the *Zillah*, in whose Court these proceedings had been had, made an Order which, after stating all that had taken place, including the claims of certain third parties, concluded thus:—"Forasmuch as the term of one year has expired from the date of the issue of notice, and the Mortgagor has not deposited the amount of the mortgage, and that the plea of the before-mentioned third parties is not cognizable in this miscellaneous case, therefore, considering that Regulation XVII. of 1806, has been complied with, it is ordered that this suit be decided, and that the papers of the case be forwarded to the Judge's Court."

Upon this, on the 28th of *January*, 1853, the

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Appellant commenced this suit in order to complete his title under the foreclosure. Treating, however, the lease to his son as a subsisting lease to that person, and himself as out of possession, he asked to have possession decreed to him, together with mesne profits from the 13th of *March*, 1851, calculated upon the rent reserved by the lease.

The answer of *Shah Ally Reza*, after raising a question touching the sufficiency of the stamp, which it is not necessary to consider here, alleged by way of defence, that the Appellant before filing his petition for foreclosure in the *Zillah* Court had not made the demand required by law; and after stating the circumstances under which the lease was granted, insisted that by virtue thereof the Appellant had fraudulently held possession of the mortgaged property in his son's name. And in order to show what was the value of this possession, the answer contains a passage which after stating the gross revenue of the various portions of the mortgaged property, amounting in all to Rs. 9,601. 7a. 2p., and the charges thereon amounting in all to Rs. 3,931. 9a. 4p., proceeds thus, "There remains Rs. 5,666. 13a. 10p., as annual profit. Out of this amount, deducting Rs. 4,740 as interest due on the principal, the remaining sum of Rs. 926. 13a. 10p. must have been annually received by the Plaintiff on account of the said amount of principal." The answer also insisted, that the Appellant was bound to render an account in conformity with sections 10 and 11 of Regulation XV. of 1793, and that the *Bye-bil-wuffa* had been vitiated by the fact of his having realized the whole of the interest as well as a portion of the principal from the profits of the mortgaged property; and that the Appellant was bound to render

an account in order that the Court might be satisfied how much was due, and from whom.

The material issues settled by the Judge were:— First, whether the Plaintiff had performed the conditions prescribed by section 8 of Regulation XVII. of 1806, and was entitled to possession. Secondly, whether Plaintiff was or was not in possession. Thirdly, whether the claim for mesne profits was correct. Fourthly, whether the receipt by Plaintiff of interest on the purchase money invalidated the *Bye-bil-wuffa*.

The cause was tried by Mr. *Loch*, the Civil Judge of *Purneah*, on the 18th of *December*, 1854.

The principal point contested on the first issue was, whether there had been a sufficient demand, and this issue was found in the Plaintiff's favour. On the third and the last issues the Judge found that the lease was, in fact, taken by the Plaintiff, who must be taken to have been, under colour of it, in possession of the mortgaged property: but that, inasmuch as it was not attempted to show that the collections realized by the Plaintiff covered the principal and interest of the debt, and it was, in fact, admitted that when the notice under section 8 of Regulation XVII. of 1806 was filed, a balance was due, and that there was nothing to show that the Defendant had paid any part of it, the *Bye-bil-wuffa* was not invalidated, and that the Plaintiff was then absolutely entitled to the property. On the fourth issue he found, erroneously and inconsistently with his finding on the question of possession, that the claim for mesne profits was correct. The decree was for possession with the mesne profits claimed.

The Defendant, *Shah Ally Reza*, appealed to the *Sudder Dewanny Adawlut*. That Court by its Order,

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dated the 22nd of *January*, 1857, held that the Civil Judge of *Purneah* had been wrong in decreeing *wassilát*, or mesne profits; and further, that as the Appellant had been found to have been in possession, he was bound, before he was entitled to have his Conditional sale made absolute, to render accounts, and to show that the loan had not been liquidated with interest from the usufruct of the property, and it remanded the case, in order that the Judge might call upon the Plaintiff for his accounts, and then, with reference to the above remarks, decide the case according to the results shown by them.

The case went back, the Plaintiff produced accounts, in which he charged himself, not with the gross collections, but with the rents reserved by the lease. The then Acting Judge (Mr. *Brodhurst*) held, that the accounts were insufficient, and that the proper accounts not having been produced he was precluded from deciding as to the balance due to the Plaintiff, and accordingly by his decree, dated the 29th of *March*, 1859, dismissed the suit.

Against this decree the Appellant appealed to the *Sudder Dewanny Adawlut*, but that Court by its Order of the 21st of *April*, 1862, dismissed the appeal with costs; refusing to remand the cause again, in order to give the Appellant an opportunity of producing the proper accounts.

He afterwards applied for a review of judgment on affidavits directed to show that he had tendered the proper accounts in the Court below, but this application was also rejected with costs, on the 21st of *January*, 1863.

The present appeal is from the decrees dismissing the suit.

The learned Counsel for the Respondent in the course of their able argument maintain the propriety of this dismissal upon various grounds, of which some do and some do not directly arise upon the decrees now under appeal. And it seems convenient to consider the latter in the first instance.

Mr. *Rolt* insisted, that inasmuch as it had been conclusively found that the Appellant was in possession of the mortgaged premises, and the plaint was, nevertheless, for possession and mesne profits; the form of the suit was of itself a sufficient ground for its dismissal. Such, however, was not the view taken in the Courts below. If it be granted that this point is raised, and it is not very clearly raised by the answer, it does not appear to have been among the grounds of the Respondent's appeal from Mr. *Loch's* decree, which, though not set out *in extenso* in the record, are noticed by the *Sudder* Court in its judgment of the 22nd of *January*, 1857. The objection, if made, was certainly not treated as a valid one by the *Sudder* Court; which did not dismiss the suit, but remanded it for re-trial on the production of the account. That remand implied that the Appellant might succeed. The real object of the suit is to perfect his title as absolute owner of the property; and their Lordships do not see why he should not have that relief, if he be otherwise entitled to it; because, under an erroneous view of the effect of the lease, he has asked for it by his plaint in a somewhat different form, and with something to which he is not entitled.

It was also urged that the *Bye-bil-wuffa*, the *Ikrar*, the lease, and the *Kabooleat* must be taken together as one transaction; that the effect of the two latter so qualified that of the two former, that the mortgage

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must be taken to have been in its inception, one for the term of three years, and that until the expiration of the term the Appellant was not at liberty to take any step towards foreclosure. Their Lordships have to observe that this was not one of the issues in the cause, and that the point is not even raised on the pleadings, nor do they think that this defence could have been successfully raised. The Respondent cannot both repudiate the obligations of the lease and claim the benefit of it. That transaction has been held, and properly held, not to effect that for which it was probably designed, *viz.*, to save the Appellant from the liabilities, whilst it gave him the advantages of a Mortgagee in possession. Still less can it be taken to do what it was never meant to do, *viz.*, modify the terms of the Conditional sale.

It was further urged, that the proceedings in the *Sudder Ameen's* Court under section 8 of Regulation XVII. of 1806 were irregular, both by reason of the insufficiency of the demand, and the non-production of the accounts in the course of those proceedings. One of the issues in the cause when it was before Mr. *Loch*, was, whether the Plaintiff had performed the conditions prescribed by the Regulations, and that issue was found in his favour. As far as appears from the printed record, the Respondent did not appeal from that finding. He had undoubtedly raised in the *Zillah* Court the question whether there had been a sufficient demand, and the fact had been found against him. He had not taken the point that the accounts ought to have been produced in the preliminary proceedings. Their Lordships are disposed to think that upon the true construction of the Regulations, and of the Circular Order, it is not

necessary either that the demand should be for the specific sum ultimately ascertained to be due, or that the accounts of a Mortgagee in possession should be produced in these preliminary proceedings, in which they cannot be investigated.

The questions which really arise upon the decrees under appeal, and on which the determination of this appeal depends, are these:—

First, whether the *Sudder* Court was right in requiring the Appellant to produce his accounts, and in remanding the cause for re-trial on the production of those accounts by the Order of the 22nd of *January*, 1857.

Secondly, whether if it were wrong in so remanding the cause, the Appellant is not now bound by that decree, against which he did not appeal.

Thirdly, whether the *Zillah* Judge and the *Sudder* Court were right in dismissing the suit, because the Appellant had not produced the proper accounts, or whether they ought to have given him further time for so doing.

Their Lordships, considering the first question independently of the authority of decided cases, are of opinion that, upon the true construction of these Regulations, there was no necessity for calling for the production of the accounts, and, consequently, that the order for the remand was wrong. The issue upon which the determination of the cause depended, and upon which even by the Order of remand it was made to depend, was whether the loan had been liquidated, with interest, from the usufruct of the property. Now, not only was there no allegation on the pleadings, or issue raised in the cause, to the effect that the loan had been thus liquidated, but

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there was an express admission on the face of the Defendant's answer that even on his mode of stating the account, the principal sum of Rs. 39,000 had, when the foreclosure proceedings were commenced, and when he ought to have made the requisite deposit, been reduced by no more than Rs. 927. It was therefore clear, upon the face of the proceedings, that the question to be tried could be answered only in one way, and that in favour of the Appellant. And the Order of remand can be supported only on the principle that, in all cases, it is imperative upon a Mortgagee who has been in possession to produce his accounts. For this position their Lordships can find no grounds in the Regulations. The words of the 3rd section of Regulation I. of 1798, from which (if at all) an inflexible obligation to produce the accounts must be inferred, are, "In all instances wherein the lender on the *Bye-bil-wuffa* may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account," &c. Two conditions are expressed, the possession of the Mortgagee, and the necessity of an account. And a comparison of this with the preceding section, and with Regulation XVII. of 1806, shows that that necessity arises, and need only arise, first, when the Mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account; secondly, when he has deposited all that he admits or alleges to be due; thirdly, when he pleads, and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the property.

It remains to be seen whether the proposition that

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the Mortgagee, who has been in possession, must in all cases produce his accounts, has been conclusively established by the authority of decided cases.

The cases cited by the *Sudder* Court in its judgment, and now relied on by the Respondent, are reported in the decisions of the *Sudder Dewanny Adawlut* of *Bengal* for 1852, pp. 678 and 1063. The transactions out of which these cases arose were not mortgages by way of Conditional sale, but mortgages of a different character, and governed by different rules. Neither authority, therefore, seems to touch the point now under consideration. On the other hand, in a more recent case, which is reported amongst the decisions of the same Court for 1859, at p. 492, the Court held that there being no averment in the answers that the Plaintiff had paid himself by the usufruct of the property, the objection that the Mortgagee had not produced his accounts could not be entertained on the appeal.

The question, therefore, cannot be said to have been concluded against the Appellant by authority; and their Lordships have already intimated their opinion, that upon principle the obligation to produce the accounts should depend on the circumstances of the case and the nature of the issues raised.

Upon the question whether the Appellant is so bound by the Order of the 22nd of *January*, 1857, against which he did not appeal, that he cannot impeach the correctness of the remand, their Lordships have to observe that the Order was an interlocutory one; that it did not purport to dispose of the cause; and consequently, that upon the principle laid down by this Committee in the case of *Maharajah Moheshur Sing* v. *The Bengal Government* (7 Moore's Ind. App.

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Cases, p. 283), upon which their Lordships have very recently acted in a case from *Oude* (*a*), the Appellant is not now precluded from insisting that the remand for the production of the accounts was erroneous; or that the cause should have been decided in his favour, notwithstanding the non-production of the accounts. In truth, the learned Judges of the *Sudder* Court, by their judgment of the 21st of *April*, 1862, treated the latter point as still open to the Appellant, although, upon grounds which appear to their Lordships to be unsatisfactory, they determined it against him.

The view which their Lordships had taken of the questions already considered renders it unnecessary to determine whether the Appellant ought to have been allowed further time, or a second opportunity for the production of the accounts required from him. Their Lordships will only say upon this point that the affidavit filed by him on the application for a review are, when contrasted with his grounds of appeal, extremely unsatisfactory, and that he appears to have done little to entitle him to the indulgence of the Court.

They are, therefore, not prepared to say, that if the production of the accounts required had been necessary, those delivered were sufficient; or that in that case there would have been any such improper exercise of the discretion of the Court below as their Lordships would have interfered with. But they think that the error of the Court below was in the dismissal of the suit, on the assumption that the production of any accounts was necessary in a case in which there was neither plea nor proof that the usufruct had liquidated

(*a*) Sheonath *v.* Ramnath, *post*, 413.

principal and interest, and no deposit had been made to cover the balance admitted to be due.

Their Lordships, on the whole case, are of opinion, that this appeal should be allowed, and they will humbly recommend Her Majesty to reverse the decrees appealed against, and also the order of remand of the 22nd of *January*, 1857, and to vary the decree of the 18th of *December*, 1854, by declaring that the Appellant was entitled to the possession of the mortgaged premises as absolute owner, by virtue of the Conditional sale which had been duly made absolute, but was not entitled to a decree for any mesne profits. Their Lordships think that the Appellant is entitled to the costs of this appeal, and also to all costs of the suit below, up to and including the costs of the Order of the 22nd of *January*, 1857.

Considering that he might have appealed against that order, and that his conduct in the subsequent proceedings in the Court below has not been satisfactory, their Lordships are not disposed to recommend that he should have the costs of those proceedings against the opposite party. He will of course be entitled to a refund of the costs (if any) which have been paid by him under any of the decrees reversed.

SHAH MUKHUN LALL, GUNGADEEN AND BOODHOO JEE - - } *Appellants,*

AND

NAWAB IMTIAZOOD DOWLAH AND HAJEE ALI - - - - } *Respondents.**

On appeal from the Court of the Judicial Commissioner at Oude.

14th & 16th Dec., 1865.

The Limitation of suits Act, No. XIV., of 1859, sec. I. cl. 9, limits the right to recover money lent, or interest, to three years, from the time when the debt became due, unless there is a written engagement to pay the money lent or interest. By section XXIV. of that Act, it is provided that such Act should not take effect in non-Regulation Provinces, until it shall be extended thereto by public notification by the Governor-General in Council, and when extended, all suits within such Province which shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if the Act had not been passed. This Act was not extended to the Province of *Oude* until *July*, 1860. In a suit brought in *January*, 1862, to recover a balance of money lent with interest, the last advance of which was made more than three years before the commencement of the suit, it was held by the Courts in *Oude* to operate as a bar to the suit. Upon appeal, such finding reversed, as it fell within the exception provided by that section, and was to be determined as if the Act had not been passed.

A letter written by a debtor in answer to a demand for payment of a debt and interest, in which he promised to pay the debt by instalments, and begging to be let off payment of interest, is an ample acknowledgment within section IV. of the Limitation of suits Act, No. XIV., of 1859, to take the case out of the operation of that Act.

THE appeal in this case was brought from a decree of the Judicial Commissioner of *Oude*, which dis-

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

missed an appeal brought by the Appellants against a decree of the Judge of the Civil Court of *Lucknow*, by which decree, in effect, he was nonsuited in an action instituted by the Appellants to recover a balance of Rs. 11,278. 3a. 0p., for principal and interest due from the Respondent, *Nawab Imtiazood Dowlah*, on account of loans of money made to him through the other Respondent, *Hajee Ali*.

These two decrees were based on the provisions of Act No. XIV. of 1859, entitled an "Act to provide for the Limitation of suits," sec. I., cls. 9 and 10, which are as follows:—"9. To suits brought to recover money lent or interest, or for the breach of any contract, the period of three years from the time when the debt became due or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money lent or interest, or a contract in writing signed by the party to be bound thereby or by his duly authorized agent." "10. To suits brought to recover money lent or interest, or for the breach of any contract in cases in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof, the period of three years from the time when the debt became due or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof."

The same Act, in section IV., provides for a revival of the right to sue, by an acknowledgment in writing, as follows:—"If in respect of any legacy or debt, the

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person who, but for the law of limitation, would be liable to pay the same shall have admitted that such debt or legacy, or any part thereof is due by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission: Provided, that if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them."

And section XXIV. provides, that the Act "shall not take effect in any non-Regulation Province until it shall have been extended thereto by public notification by the Governor-General in Council, and that whenever it shall be so extended, all suits within such Province which shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed."

The debt was denied by the first Respondent, but both decrees were in favour of the Appellants on the merits, and they proceeded entirely on the provisions of the above Act of Limitation of suits, deciding, in effect, that the suit of these Appellants to recover the debt was barred by effluxion of time; and that there was not a sufficient acknowledgment to revive the right to sue.

The facts of the case were as follows:—

The first Appellant in, and previous to, the year 1852, carried on business at *Lucknow*, in the Province of *Oude*, as a Banker and Merchant, using the names of the other two Appellants, his sons, *Gungadeen* and *Boodhoo Jee*, as the name of his firm. The first Respondent was also an inhabitant of *Lucknow*,

and he as well as his ancestors before him had pecuniary transactions with the Appellant. Previous to the year 1852 he went to *Calcutta* in attendance upon the King of *Oude*, and there remained, leaving his wives and the greater number of his domestic servants behind him in his residence at *Lucknow*.

On his departure from *Oude*, the first Respondent appointed the other Respondent, *Hajee Ali*, his *Mockhter*, to manage during his absence his pecuniary affairs in *Lucknow*, and in particular he was authorized to receive and remit the first Respondent's salary, pay for the maintenance of his wives and servants, and for that purpose to borrow money from the first Appellant, *Shah Mukhun Lall's* firm, when required.

It appeared that the allowance made by the first Respondent for the maintenance of his wives and servants was at this time Rs. 500 *per mensem*, and that the Appellant, *Shah Mukhun Lall*, being desirous of reducing the amount, wrote to the former asking for his sanction to make the monthly payment Rs. 150.

To this communication the first Respondent wrote a reply in a letter, bearing his seal, and dated the 22nd *Shabun*, 1272 *Hijree*, corresponding with the month of *May*, 1855, C.E., in which, after referring to this proposal, he stated, that he was himself unable to make a greater reduction than to one-half the original sum—*viz.*, to Rs. 250 *per mensem*—as he considered they would not be able to manage their expenses on a smaller sum; but he at the same time wrote as follows:—"You and *Mirza Hajee Ali Beg* are at

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liberty to make any reduction you can," and then added, "I wish you will pay monthly whatever sum you fix upon." The Appellant, *Shah Mukhun Lall*, acted upon this request, and continued to make advances through the Respondent *Hajee Ali*.

The Appellants subsequently delivered their account to the first Respondent, through their *Gomashta*, at the same time demanding payment; and he acknowledged the account by a letter written from *Calcutta*, dated the 20th *Suffur*, 1277 *Hijree* (*September*, 1860). It was neither signed nor sealed, but bore on the envelope the following words:—"To *Shah Mukhun Lall* from *Imtiazood Dowlah Bahadoor*," and in referring to the account received by him, he lamented the revolution in *Oude* as having ruined him, but mentioned his salary as being still enjoyed by him, and then expressly engaged to pay the debt due to the Appellant, *Shah Mukhun Lall*.

It appeared that only two of the promised instalments, in respect of the debt, were ever paid, and that these amount only to the sum of Rs. 1,700, for which credit had been duly given in account.

The Appellant, *Shah Mukhun Lall*, having been unable to obtain any further payment, brought a suit in the *Lucknow* Civil Court, on the 13th *January*, 1862, at first in his own name alone, against the first Respondent as Defendant, to recover the balance remaining due (after crediting the above payments), *viz.*, Rs. 11,278. 3a. 0p. The plaint stated the principal facts before mentioned, and, amongst others, the settlement of accounts, the balance then struck, and the amounts subsequently advanced, and by the plaint he charged that the moneys were received

through the *Hajee Ali*, as the Defendant's agent, and that it was due from the latter, but remained unpaid, notwithstanding repeated demands.

A summons was served upon the first Respondent, who wrote a letter to the Court, bearing his seal, in which he acknowledged such service, but stated that he had been in *Calcutta* seven years, and represented that he had no occasion to borrow money from the Appellant, *Shah Mukhun Lall*, whose person he stated he did not even know.

On the 6th of *June*, 1862, proceedings were had by the Civil Judge of *Lucknow*, when the letters and other documentary proofs of the Plaintiff were produced. An Order was then made by the Judge, to the effect, that the Plaintiff should amend his plaint by adding to the record the names of his two sons (the Co-Appellants) as parties Plaintiffs, because the business had been carried on in their names, and that the Respondent, *Hajee Ali*, should be made a Defendant, as the first Respondent had transacted his business through him.

The issues settled and recorded by the Judge were as follows:—First. Limitation. Secondly, whether *Hajee Ali* had the requisite powers from the Defendant to contract debts? Thirdly, whether the letters produced by the Plaintiff as those of the Defendant were really letters by the Defendant, and whether they amounted to an acknowledgment of the present claim? And, fourth, to what amount, principal and interest, the Plaintiffs were entitled?

The Civil Judge also sent a letter to the agent of the Governor-General with the King of *Oude*, in *Calcutta*, enclosing written interrogatories to be put

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and answered by the Defendant, the first Respondent, on oath; and directing that his large seal, as well as his signature, should be attached to his answers when taken down in writing. The Judge also forwarded with the interrogatories the letter of the first Respondent, dated the 5th *Zehy*, in the *Hijree* year 1272, corresponding with the Christian year 1855, and above particularly mentioned in order that the same might be put before him and examined too.

A supplemental plaint was filed on the 16th of *June*, 1862, in order to carry out the last-mentioned Order as to parties; and the Respondent, *Hajee Ali*, was duly served with a summons as a Defendant in the suit.

On the 29th of *July*, 1862, another proceeding in the suit was had and recorded by the Civil Judge, when the interrogatories, with the answers of the *Nawab*, were filed. In these answers he denied that he had ever any money transactions with the Plaintiffs, or that he ever permitted any one to have such transactions; and he stated that he never heard before of such transactions, but he admitted that the Respondent, *Hajee Ali*, was his *Karindah* (agent), although he denied that he ever wrote "to *Sahjee*," or to the Appellant, *Shah Mukhun Lall*, to advance money to him on his account, and then swore that he was not aware that money was so advanced, and that nothing was due to Plaintiffs for either principal or interest. To an interrogatory, asking whether the last-mentioned letter (at the time of his examination shown to him) was his letter bearing his seal, he answered as follows:—"The seal is mine, but not the letter. *Hajee Ali*, my *Karindah*, had the charge of my

seal when I was in *Lucknow*, but when I came to *Calcutta* I brought my seal with me. I gave away some blank pieces of paper impressed with my seal to be used when required. The sign '*Sawd*' attached to the end of the letter is not my signature." The Respondent, *Hajee Ali*, was examined as a witness. He proved the payment of the moneys through himself, the execution of his *Mooktearnamah*, and the authenticity of several of the letters and documents above-mentioned, of the first Respondent; and as to the last-mentioned letter, denied by the latter as aforesaid, he said it is Defendant's, and was given (to Plaintiffs) through himself, and that he had received it through the *Nawab's* friend, *Fuzul Ali*. He also produced and proved two additional letters addressed to himself, and bearing the first Respondent's signature.

Among the letters put in evidence were the following:—Translation of a letter (B) to the address of *Sahjee* in these terms:—"Dear Sir,—After compliments, I beg to inform you that I have received the account through your *Gomashta, Lalla Shah Soonder*, and become acquainted with its contents. But, dear *Sahjee!* it is known to the world how we have been ruined; and you also are well aware of my circumstances, that no private property has been left to me, and I am obliged to manage my expenses (out of my salary which is allowed to me) the best way I can.

"A friendly intercourse and money transactions have been carried on between you and me for a long time, and there never took place any disagreement of any kind, and even now, please God, no difference will arise. I am every way willing to pay off your

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money, and have no objection on that head. But I wish you will, under present circumstances, receive from me the principal due to you by instalments; my means do not enable me to pay you the interest, and I will not be able to pay it. I have no hesitation or objection to pay you the principal sum. I shall suffer inconvenience, but, please God, I will pay you your debt by instalments; but I certainly demur to pay the interest, because I do not know how to pay it. Under such circumstances, it becomes you also to give up your claim to interest, because you and I having been on friendly terms for a long time, it is nothing but proper that you should show me such consideration. After the revolution that has taken place in our affairs, may God enable me to pay off your principal debt! I will consider myself very fortunate, and thank God if I succeed in liquidating it.

"D/ 20th *Suffur*, 1277 *Hijree*.

"Postscript.—Having stated above that I am ready to pay you by instalments, I take this opportunity to let you know that I can arrange to liquidate your debt by monthly instalments of Rs. 200 each, to be paid to you, please God, monthly, through your agent, when I receive my allowance from the British Government."

Translation of a letter (D.) to the address of *Shah Mukhun Lall*:—"Dear Sir,—After compliments, I beg to inform you that before this I wrote to you that I could pay the principal by intsalments, but that you would excuse me for the interest, but you have not yet sent me any satisfactory answer. I therefore write to you again that a friendly communication and money dealings have existed between you and me for a long time, and that no disagree-

ment ever arose, nor did I make any objection in my dealings with you. I did whatever you told me. But my objection to pay you the interest now arises from my being involved in ruined circumstances, which is known to the world, and even you yourself are well aware that I have been robbed of all the private property I had, and that nothing is left to me. My salary was stopped for a long time; but as it is now allowed, I am ready to pay off your principal without any hesitation, although I shall suffer much inconvenience even by paying your principal, because God knows how I manage my expenses in so small a sum. Hence, under the present state of affairs, when times have been so much changed, it is nothing but proper that you should have a regard to the friendly intercourse which has subsisted for a long time between you and me, and not demand the interest. You should show me some consideration, and receive the principal due to you by instalments. Pray do not withhold your kindness in this respect, and under present circumstances consider it a booty if you have your principal debt liquidated. I am unable to pay the interest, and can by no means pay it. Otherwise I would have made no objection to discharge the interest, and would have paid it. You should send me an early answer."

Translation of a letter (F.) to the address of *Shahjee*:—"Dear Sir,—I wrote to you frequently asking you to return me the whole of my bonds, and to have one drawn in lieu of them; that I can pay you interest at the rate of 8 *annas* per cent.; that you should make up your account and have one bond executed for the aggregate sum, and that you should receive payment from me by monthly instalments of

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Rs. 200, each, and I told the same to your agent; but I am surprised to find that neither you have written to me anything on the subject up to this time, nor has your agent given me any answer.

"I am, therefore, under the necessity of writing to you again, and request you will send all my papers, consisting of bonds, etc., which you have in your possession, to your agent here, who may return them to me and have one bond executed in lieu of all of them. I also wish that your agent may be allowed to receive from me the instalments of Rs. 200 a month promised by me, which I am ready to pay. Please send me, without any hesitation, an immediate and complete reply as soon as you receive this letter."

By the decree of the Civil Judge at *Lucknow* (Mr. *E. G. Fraser*), the suit was dismissed. His judgment, dated the 29th of *July*, 1862, was as follows:—"That the Defendant was largely indebted to Plaintiff, through his old *Karindah*, *Hajee Ali*, there can be no doubt, and there is much perjury on that score in the Defendant's deposition taken by commission in *Calcutta*. But therein he makes important admissions, such as that *Hajee Ali* was really his *Karindah*, had his seal, and moreover used to be entrusted with *carte blanche*, bearing impressions of the seal made by Defendant. In different papers, bearing his acknowledged seal, he alludes to the debt; in one he authorizes *Hajee Ali* to treat with Plaintiff for advances, and proposes that £4,000 be paid to him, and in one he binds himself to *Hajee Ali*, his factor, to liquidate all Plaintiff's claim. All this is sufficient to prove the falsity of the *Nawab's* deposition on oath. But none of the papers alluded to constitute a written acknowledgment, such as will

bar limitation, being all much above three years old. The letters B. and F, alleged to be from Defendant, and sent from *Calcutta*, are written within the term of three years, but they prove nothing; neither of them contains seal or mark to prove that they came from Defendant; indeed, do not mention his name. A cover of one is referred to, to show that one of these letters was covered by it. But it merely mentions Defendant; is evidently not in his hand, and there is nothing to connect him with it. We can go into no inferences in such a matter, or, instead of inferring that he caused the unsigned and unsealed letter to be sent, we might infer that Plaintiff had got his own *Calcutta* agent to send it by way of supplying what would be inferred evidence. Bearing on this point, I would remark that it is alleged that Plaintiff held a Bond which is said to have been lost; but a mem. K, certifying to the fact that such a Bond was given, is produced by Plaintiff, as written by *Hajee Ali*, on the same day as the missing Bond, such a certificate, given in addition to a Bond, and saved while the Bond is lost, is a curious substitution for a Bond. It professes to be a mere *mem.* unwitnessed, and signed by the agent. This, at the best, cannot have the same weight as if a formal Bond, signed by the Defendant, had been produced. But even such a Bond produced, unless duly witnessed, would be out of date, because even to it only a three years' run would be allowed. The *mem.* in question is marked K, and states that all previous vouchers were then reduced to a single Bond, the one lost. Now, there was admittedly no other Bond executed by Defendant, or on his account, and under his seal, after that date. Yet the letter F., with its envelope,

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on which Plaintiff relies to save limitation, proposes that all previous Bonds be reduced to a single one. This had already been done, if K. be authentic and true; and in this case the letter F. is open to suspicion of being a mere manœuvre to support the plaint, or if it really came from Defendant, then the story of K., and the missing Bond, would seem to be apocryphal. Either way, it shows how improper it would be to rest on such papers as Plaintiff relies on to cure the legal defect of this case. As I can find no sufficient ground to recognize any part of Plaintiff's claim as taken out of the Act of Limitation, the several transactions being of older date than three years, and unsupported by any Bond, and without any such voucher or written admission as would give the case the benefit of a six years' term of cognizance, I feel obliged to dismiss the suit, with costs."

The Appellants appealed to the Judicial Commissioner of *Oude*.

The hearing of the appeal took place on the 26th of *March*, 1863, before Mr. *G. Couper*, the Judicial Commissioner, when by a decree of that date he dismissed the appeal, delivering the following judgment:—"The question to be decided in this case is simply whether the Appellants hold any reliable Bond binding on the Respondents of later date than three years. The only two notes which fall within the period are B. and F. The original letter A. contains no promise to pay; B. is unsigned and unsealed, and it is obvious that it will never do to admit such a document in evidence against the alleged writer. F, too, is not sealed; but the Judge is mistaken in saying that it does not even mention the *Nawab's* name. At all events, there is his name now on the

note. I perceive, moreover, that the Judge says that the Bond K. states that all previous vouchers were then reduced to a single Bond—the lost one. I cannot find any statement in K. All that is said in K. is, that on a certain day accounts were struck, and a balance of Rs. 7,003 appeared against *Nawab Imtiazood Dowlah.* The witness, *Hajee Ali,* however, states that all the sums due to the Plaintiff are included in one Bond up to the date of 1st *Shaban,* 1273; and that is sufficient to support the Judge's argument that F. is probably not genuine, seeing that it prefers the same request—*viz.,* that all former Bonds be brought in, and a new one executed. Before me, the Appellants' *Vakeel* pleaded that the period of limitation should be calculated from the date of the payment of the last instalment of the debt, which, according to his account books, took place on the 14th of *June,* 1859; but a period of limitation cannot now be renewed by a payment, unless it be made at a time specifically conditioned. The Appellants must take the consequences of not having had recourse to the ordinary legal precautions for the protection of their interests. It is impossible to admit his claim on the strength of unsealed and unsigned papers, or on the entry of the payment of an instalment in his account books, and the appeal, therefore, must be dismissed."

The present appeal was from this decree.

The Attorney-General (Sir *R. Palmer,* Q.C.), and Mr. *Leith,* for the Appellants.

First, there has been a miscarriage of justice. The Judicial Commissioners in the Court below were entirely wrong in supposing that the Limitation of suits Act, No. XIV., of 1859, applied at all to the case.

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The last section of that Act expressly provides, that it is not to take effect in a non-Regulation Province like *Oude*, until, first, a notification has been issued by the Governor-General entrusting its operations to such non-Regulation Province, and secondly, when so extended, it further provides, that all suits within such Province which should be pending at the date of the notification, or should have been instituted within a period of two years after the date thereof, should be tried as if the Act had not been passed. Here the suit was instituted in *January*, 1862, therefore it falls within the exception provided by the Act, and the question of limitation must be governed by the law as it existed before the passing of that Act. This construction with respect to the question of limitation was so decided by this Tribunal in *Saligram* v. *Mirza Azim Ali Beg* (*a*), upon the operation of the Circular Order, No. 104, of 1860, issued by the Judicial Commissioners of *Oude*, which introduced the rule of three years' limitation to simple interest debts and six years to registered Bonds.

Secondly, even if the limitation of three years by the Circular Order, No. 104, of 1860, applied, the case was taken out of operation of the rule. There has been a revival of the right to sue. The Respondent, *Nawab Imtiazood Dowlah*, the debtor, by an acknowledgment in writing, in the letter F. signed by him, as required by sec. 4 of Act No. XIV., of 1859, admitted that the debt for which the suit was brought was due. Therefore, the period of limitation of three years, computed from such admission, had not expired when the suit was commenced. In that letter he distinctly recognizes the debt, and he promises to pay it by instalments

(*a*) *Ante*, p. 114.

of Rs. 200 a month, and so again in the letters B. and D. he acknowledges the debt. The case falls within the rule laid down by Baron *Parke* in *Tippets* v. *Heane* (*a*), that in order to take a case out of the Statute of Limitations by a part payment, it must appear that the payment was made on account of a debt for which the action was brought, and that it was made as a part payment of a greater debt, which was the case here.

Lastly, we were debarred from giving evidence to prove these letters. The lower Court appears to have thought that letter F. should have had the seal of the first Respondent, and he stopped the case. The appeal Court, under section 55 of the Code, could have called for further evidence. Upon all principles of justice the case ought to be remitted to the Court below to admit further evidence.

Mr. *Rolt*, Q.C., and Mr. *T. D. Archibald*, for the first Respondent.

The real points are, first, upon the genuineness of the three letters B. D. and F. put in evidence, and secondly, if they are genuine, whether there is any acknowledgment to take the case out of the operation of the rule of limitation of suits, under Act No. XIV., of 1859, or by the *Punjab* Code, introduced by the Circular Order, No. 104, of 1860.

First, there is not sufficient evidence to prove that *Nawab Imtiazood Dowlah* was ever liable at all in respect of the claim in question, but even if the debt was proved, the right to recover was barred by Act No. XIV., of 1859, for the Limitation of suits, as held by the Court below.

(*a*) 1 Crom. Mee. & Ros. 253.

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Secondly, the objection of the Appellants' Counsel urged here for the first time that the case is taken out of the operation of that Act, by an acknowledgment in writing by the *Nawab*, as provided by sec. 4 of Act No. XIV. of 1859, cannot now be entertained. It should have been pleaded. Here, however, the letters relied on were not proved to be in the *Nawab's* handwriting, nor do they, if proved, make a sufficient acknowledgment of the debt to take it out of the Act, by analogy to the English cases on the Statute of Limitations. Lord *Tenterden's* Act, 9th *Geo.* IV., c. 14, sec. 1, requires an "acknowledgment in writing" to take the case out of the Statute of Limitations, 21 *Jac.* I., c. 16. In this case the same construction should be put on the word "admission" in the fourth section of the Limitation of suits Act as "acknowledgment" in the English Statute. The "admission" there mentioned must show an inference to pay on request. That principle is correctly laid down in *Tanner* v. *Smart* (*a*). The case of *Hart* v. *Prendergast* (*b*), is similar to the present. There a letter in answer to an application for the payment of a debt was in these words, "I will not fail to meet Mr. *H.* on fair terms, and have now a hope that before perhaps a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance;" but the Court held that it was not sufficient to defeat a plea of the Statute of Limitations.

If the Appellants felt aggrieved by the refusal to hear further evidence, they should have appealed from such refusal, and not now at the last moment raise such an objection.

(*a*) 6 Bar. & Cr. 603. (*b*) 14 Mee. & Wels. 741.

Judgment was delivered by

The Right Hon. Lord CHELMSFORD.

The printed cases both of the Appellant and Respondent assume that the question upon the appeal is to be governed by the new law of limitation in the Act, No. XIV. of 1859. But the last section of that Act provides that the Act "shall not take effect in any non-Regulation Province (to which class *Oude* belongs) until it shall be extended thereto by public notification by the Governor-General in Council, and that whenever it shall be so extended, all suits within such Province which shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed." In the recent case from *Oude*, *Saligram* v. *Mirza Azim Ali Beg*, (10 Moore's Ind. App. Cases, 114,) it appeared that the Act, No. XIV. of 1859, was not extended to *Oude* till *July*, 1860. As this suit was commenced on the 13th *January*, 1862, it falls within the exception, and must be determined as if the Act had not been passed.

In the case just referred to, in which the question arose what law of limitation was to be applied, it appeared that since the annexation of the Province of *Oude* various rules of limitation had prevailed. That in 1857, suits of the nature of the present one were subject to a limitation of six years, and to the general provisions of the *Punjab* Code. That in *March*, 1859, these rules had been modified by a Circular Order, No. 51, which had afterwards been repealed by another Circular Order, No. 104, dated the 4th *July*,

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1860. And their Lordships held that the case before them was to be governed by the last-mentioned Order. Upon the authority of that decision it appears that this case must fall within the 10th of the rules then promulgated under that Order. This declares the period of limitation to be three years "in all suits for money lent for no definite period or for interest thereon, unless there is a written engagement, and where Registry offices existed at the time such engagement was registered and signed by the party to be bound thereby, or by his duly authorized agent."

The rules which were promulgated under this Circular Order were modifications of the *Punjab* Code which previously existed, and, therefore, it may be necessary in this case to resort to that Code for the purpose of determining the time from which the period of limitation is to be calculated, or the circumstances which will take a particular case out of the operation of the limitation. Having ascertained the law to be applied to this case, we proceed to consider the question to be decided.

The suit was instituted by the Appellant, carrying on business as a Merchant at *Lucknow*, to recover a balance of Rs. 11,278. 3a. 0p., principal moneys and interest alleged to be due from the first named Respondent, on account of advances made to him for the maintenance of his family, through his agent, the other Respondent, *Hajee Ali*.

The plaint was filed on the 13th of *January*, 1862, and the last advance was in 1858, consequently more than three years before the commencement of the suit.

Issues were settled by the Judge, the first of them being limitation, and the case was ultimately decided

upon the question, whether the Plaintiff had given sufficient evidence of an admission of the debt by the Respondent to prevent the application of the period of limitation to his claim.

In order to prove such an admission, the Plaintiff produced three letters marked respectively *B*, *D*, and *F*. Letter *B*. appearing by its own date, and the other two letters by the post-marks upon their envelopes, to have been written in the year 1860. The letter *F*. purports to be signed by the *Nawab*, but has no seal. The other two letters have neither signature nor seal, but the envelope of *D*. appears to have been "dispatched by *Imatiazood, Dowlah Bahadoor* from *Khizzirpoor* in *Calcutta*." Letter *F*. is stated to have been filed with the plaint, but no attempt was made to prove that it was signed by the *Nawab*. No other evidence was given of the letters *B*. and *D*., except by *Hajee Ali*, who was called by the Plaintiff, and said "*B*. came to the Plaintiff, not through me, *D*. ditto." This was perhaps scarcely sufficient to admit them to proof, but the Judge received them, and then the question arose whether being admitted they did not carry with them internal evidence of their genuineness. There can be no doubt, that when the *Nawab* left *Lucknow* his family remained behind, and would require to be maintained during his absence. *Hajee Ali* was appointed his Agent by a *Mokhtarnamah* sealed with his seal, in which it is contemplated that money would be borrowed from the Appellant's firm, and *Hajee Ali* besides this authority was armed with blank pieces of paper impressed with the *Nawab's* seal, to be used when required. It is not pretended that the family were maintained out of the funds of the *Nawab*, and no other source of supply was ever

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suggested, except that which was derived from the Appellant. Under these circumstances the debt to the Appellant was incurred. His claim is for nothing else than advances made to meet the wants of the *Nawab's* family, with interest upon these advances. The *Nawab* was examined upon interrogatories. He denied all knowledge of the Appellant. Asserted that he never had himself, nor permitted any one to have, any money transactions with him. That he was not aware that money had been advanced by the Appellant, and that nothing was due to him for principal or interest. It is impossible not to agree with the observations of the Civil Judge (*a*) upon these answers of the *Nawab*. "That Defendant was largely indebted to Plaintiff through his old *Karindah*, *Hajee Ali*, there can be no doubt, and there is much perjury on that score in the Defendant's deposition."

But if the Respondent was indebted to the Appellant through his agent, is it at all credible that he should have been ignorant of the fact, and that knowing that his own funds had not been applied to the maintenance of his family, he should never have had the curiosity to inquire from what source the supplies were drawn? It is clear that he must have known that he was indebted to the Appellant for the means of support of his family, and it is most improbable that when the debt had grown to a large amount, and his own affairs had suffered considerably from the annexation of the province of *Oude*, no communication should have taken place between him and his creditor. Assuming the probability, in this state of things, that something would have passed between

(*a*) *Ante*, p. 372.

them, it will be found that the letters in question are precisely those which might have been expected to be written under the circumstances. They are in the following terms: [His Lordship read the letters *B.*, *D.*, and *F.*, *ante*, pp. 369–371, and proceeded.]

Assuming, then, the genuineness of these letters to be thus established, the question arises whether they contain a sufficient admission of the debt to prevent the application of the period of limitation to the Appellant's suit. As the Judges below seemed to regard the letter *F.* as probably not genuine, and some suspicion may rest upon it, it will be better to confine the consideration of this question to the letters *B.* and *D.* Their Lordships entertain no doubt that if the question were to be tried by the rules of English law before Lord *Tenterden's* Act, these letters offering to pay the principal money by instalments, and praying to be excused from the payment of the interest, would be an ample acknowledgment to take the case out of the Statute of limitations, and they are not aware of anything in the *Punjab* Code which would lead to a different construction. The Judges in the Courts below dealt with the questions rather summarily, and disposed of the case without affording the Appellant an opportunity of supplying any deficiency which they found in his proof. But if they proceeded upon the Act for the limitation of suits, No. XIV. of 1859, and both the Civil Judge and the Judicial Commissioner thought that letter *F.* was out of the question, their conclusion was right, because letters *B.* and *D.* being without signature, there was no acknowledgment in writing signed by the party to be charged. But that Act not being applicable, and an admission of the debt being all that was requisite to

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save the limitation, even if letter *F.* were put aside, the letters *B.* and *D.* being before the Judges, they ought to have considered them and determined whether they were sufficient to prevent the Plaintiff's remedy being barred. To this consideration their minds were never applied, and in dealing with another point which arose in the case, there seems to have been a miscarriage. It was proved by *Hajee Ali* that the *Nawab's* brother, *Hadee Ali Khan*, paid the Appellant Rs. 1,700, in two sums, after he became agent. The Civil Judge appears to have entirely overlooked this fact. But the Judicial Commissioner, dealing with the argument that the period of limitation should be calculated from the last of these payments, which was made on the 14th of *July*, 1859, observed (*a*) that "a period of limitation cannot now be renewed by a payment unless it be made at a time specifically conditioned." It is difficult to understand to what Code the Judicial Commissioner was referring when he made this observation. In the Act, No. XIV. of 1859, there seems to be no provision giving effect to a payment on account, or partial satisfaction. The *Punjab* Code, Part II, section 1, clause 6, limits suits to a certain time after the cause of action shall have arisen, unless (amongst other things) the complainant has "obtained an admission or partial satisfaction of his demand from the opposite party."

But from clause 7 it appears, that it is not every part payment which will amount to "a partial satisfaction of demand" within the meaning of the rule. It must be a payment according to a regular and continuous course of dealing, "something tantamount to a running account." It was this qualification which

(*a*) *Ante*, 275.

the Judicial Commissioner probably had in his mind when he made the observation; but if he meant to apply this Code, and had turned to the words of it, he probably would have thought that the payments made by the Defendant's agent upon an account, continued monthly for several months, ought to be regarded as tantamount (at least) to a running account, if not itself correctly described as a running account.

The case has not been properly dealt with, nor fully and sufficiently considered in the Courts below, and, in their Lordships' opinion, it ought to be submitted to further and more careful investigation. They will, therefore, recommend to Her Majesty that the decrees be reversed, and the cases remitted to the Court below for trial of the issues between the parties.

KAMALA NAICKEN - - - - *Appellant,*

AND

PITCHACOOTTY CHETTY - - - *Respondent.**

On appeal from the High Court at Madras.

1st, 2nd, & 4th Dec. 1865.

THE appeal in this case was brought by *Kamala Naicken*, the *Zemindar* of *Ammaya Naickanur*, the Defendant in a suit instituted by the Respondent against him in the Civil Court of *Madura;* which suit sought relief in the nature of an injunction to prevent the Appellant, as lessor, from interfering with the possession and enjoyment of the

A., the lessee for a term of a *Zemindary*, brought a suit against *B.*, the lessor, to prevent *B.* interfering with his possession, which he had under the lease granted to him by *B.* in consideration of certain pecuniary advances made by him to *B.* The relief sought was in effect an injunction to restrain *B.* from collecting the revenue of the *Zemindary*. The defence set up by *B.* in his answer was, in substance, that the lease was an executory contract, and, being without consideration, could not be enforced; and was moreover void for maintenance, by reason of a subsequent agreement for the advance of a sum of money to carry on a suit, which agreement had not been carried out. The Judge of the Civil Court adopted this view, and held the lease void. The High Court of *Madras* on appeal treated the case as a suit for specific performance, and decreed execution of the lease. Upon appeal the Judicial Committee sustained the decree as to possession under the lease; but as it appeared from the evidence questionable, whether the transaction in respect of the lease did not really operate only as a loan, and as a right to redeem might exist, the affirmance was made with a declaration, that it was to be without prejudice to the claim (if any) of *B.* to which he might be entitled, and to any question which might be raised as to the amount actually advanced by *A.* to *B.*

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

profits of that *Zemindary*. The Respondent claimed under a lease, dated the 17th of *September*, 1851, of the *Zemindary* for the term of ten years. By the decree of the Civil Court, Mr. *Cotton*, the Civil Judge, held, first, that the lease had been cancelled by a subsequent agreement executed by the Respondent on the 25th of *November*, 1851, and secondly, that as the transaction, as between the Appellant and Respondent, was, in his opinion, of the nature of maintenance and savoured of champerty, the lease was not a legal or valid instrument, the provisions of which could be enforced either in law or equity. Upon appeal this decree was reversed by the High Court at *Madras* (consisting of the Chief Justice, Sir *Colley Harman Scotland*, and Mr. Justice *Strange*), and by that Court's decree it was declared, that the Respondent was entitled to specific performance of the lease and to the possession and enjoyment of the *Zemindary*, under the terms of the lease. The present appeal was from this decree.

The case of the Appellant was, that as the agreement of the 25th *November*, 1851, was proved, and the Respondent having failed to pay the money therein mentioned, the lease under the circumstances became forfeited and void; and, therefore, that the decree of the High Court was unjust in decreeing specific performance of the lease. On the other hand, the Respondent insisted that the lease was valid and the agreement a fabricated document, and submitted, that the objections of champerty and maintenance, even if raised upon the pleadings, were not sustainable.

The substance of the pleadings and evidence appear sufficiently in their Lordships' judgment.

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The Attorney-General (Sir *R. Palmer*, Q.C.), Mr. *W. H. Melvill*, and Mr. *J. D. Mayne*, for the Appellant; and

Sir *Hugh Cairns*, Q.C., and Mr. *W. W. Mackeson*, for the Respondent.

21st Dec. 1865.

Their Lordships' judgment was pronounced by

The Right Hon. Lord CHELMSFORD.

The original suit out of which this Appeal arises was instituted in the Civil Court by the Respondent, for the purpose of obtaining undisturbed possession of a lease of the *Zemindary* granted to him by the Appellant, the *Zemindar*.

The lease, which is dated the 17th of *September*, 1851, recites that the Appellant had leased out to the Respondent the whole of the *Zemindary* for a period of ten years from *Fusli*, 1267 (answering to the year 1857, A.D.), and had fixed the amount of lease at Rs. 19,000 per annum. It then directs that out of the Rs. 19,000 the lessee should pay the *pesh kist* of the *Zemindary*, at Rs. 13,961. 8a. 6p., and certain other expenses, amounting in the whole to Rs. 16,469. 8a. 6p., and that out of the amount to be realized during the ten years at Rs. 2,530. 7a. 6p., after deducting the Rs. 16,469. 8a. 6p., Rs. 3,000, which the lessor states "I have up to this day borrowed from you under the Bonds executed to you by me and its interest," should be paid (for this is clearly what was intended, although the sentence is not complete); and it then proceeds thus: "that if I can afford to pay the same before the lease of the *Zemindary* shall take effect in *Fusli*, 1267, you should receive the principal and interest; that I should also pay the

said amount if demanded by you; that even if the said debt may be thus discharged, still you would, without any objection whatever, enjoy the lease of the said *Zemindary* for the said ten years, in consideration of the assistance you have done to me; that as you have at my request agreed to lend me Rs. 18,000, in order to discharge my debts, and you should, after getting possession of the said *Zemindary*, lend me Rs. 5,000, in *Fusli*, 1267, Rs. 5,000 in the following *Fusli*, and Rs. 5,000 in the next following *Fusli*; and should credit for these sums, and the said sum of Rs. 3,000 (in the event of it not being paid before the lease takes effect), the aforesaid annual residue Rs. 2,530. 7a. 6p.; that in the event of my not requiring the said loan, you should deduct the said sum of Rs. 3,000 and its interest from the amount to be realized by you for the debt at Rs. 2,530 per annum, and pay me the remainder annually." The Appellant, on the same day, executed two Bonds to the Respondent, one for Rs. 2,000 and the other for Rs. 1,000. The Bond for Rs. 2,000 is in these terms, "To meet the cost of suit now instituted by me, and the demand of *Ramakrishna Setti* by means of precept, &c., I have up to this date borrowed of you the sum of Rs. 2,000. For this sum of Rs. 2,000 and the interest thereon, at 1 per cent. per mensem, I have rented out to you my *Zemindary* for a term of ten years from *Fusli*, 1267, and executed a lease specifying the amount of the rent to be Rs. 2,530. 7a. 6p. per year: therefore you should credit this rent amount towards the principal and interest in question. If you require the said principal and interest before the said *Zemindary* is put in your possession in *Fusli*, 1267, I shall pay them, and I

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shall also discharge the said debt if I could get coin. Although the debt may be discharged as aforesaid, yet there is no objection whatever in your enjoying the lease, of the said *Zemindary*, under the terms of the lease, for a term of ten years from *Fusli*, 1267." The Bond for Rs. 1,000 recites the execution of the bond for Rs. 2,000, and in all other respects is exactly similar. In addition to these securities the Appellant on the same day (the 17th of *September*, 1851), issued an order to the inhabitants of the villages in his *Zemindary*, reciting the lease to the Respondent from *Fusli*, 1267, to *Fusli*, 1276, directing them "to continue to pay during the said *Fusli* to the said *Settiar* (the Respondent), or his agents, all sorts of revenue, and place themselves under his orders."

Upon the arrival of the term at which the Respondent became entitled under the lease to the possession of the revenue of the *Zemindary*, he sent the above order of the Appellant to the inhabitants of the villages, but found that the Appellant had issued a counter order, directing them to send to himself the collections and accounts.

The Respondent thereupon instituted his suit in the Civil Court of *Madura*, praying for a decree adjudging the Defendant not to interfere with and prevent his enjoyment of all the incomes of the *Zemindary*.

The Plaintiff in his plaint recites that having obliged the Defendant by lending him Rs. 3,000 on the 17th of *September*, 1851, in relief of the distress which he had been subject to, he has leased out to him the whole of his *Zemindary*, and then sets out the stipulations in the lease, and after stating the

takid or order to the inhabitants of the villages of the same date, he alleges that he had sent a copy of the Defendant's *takid* with his own *takid* to the villagers who had admitted them, but that Defendant had sent a counter order, and had thus prevented him from holding according to the terms of the lease, and he prays for a decree in the terms above mentioned.

The Defendant by his answer alleges that the Plaintiff, a Merchant, has, with a view of defrauding the Defendant and getting the agreement in question from him by holding out to him hopes of pecuniary and other assistance, executed separate documents to the Defendant's men, and having thus gained them over and caused them to persuade the Defendant, has thus fraudulently obtained the agreement in question.

That the sum of Rs. 3,000, which is said to have been advanced to the Defendant by the Plaintiff for the agreement in question was never paid. That the Plaintiff has entirely omitted to mention in his plaint the stipulations of the documents passed respecting the same, and the documents passed in pursuance thereof in regard to certain other transactions, as also the stipulation of these documents by which the Plaintiff is bound to do certain acts.

The Plaintiff in his replication denies that the lease was obtained by holding out any hopes to the Defendant, or by executing any documents to the Defendant's men as alleged in the answer. And as to the Rs. 3,000 not having been paid, he states that the Defendant has not only executed a Bond for the sum of Rs. 3,000 which is said in the plaint to have been lent to him by the Plaintiff, but has also acknow-

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ledged his (Defendant's) receipt of the same in the said lease.

And lastly, the Defendant by his rejoinder states "that about seven years ago the Plaintiff, with a view of obtaining a lease of the Defendant's *Zemindary*, and breaking his friendship with Mr. *Fondclair*, who had obtained an *Izaradar* and had held dealings with him at the time, caused the Defendant to institute a suit against that gentleman, and held out to him hopes of pecuniary assistance for that suit, for the precept to which the Defendant was then liable, and other necessary expenses. That the Plaintiff has also caused the Defendant's men and friends (whom he gained over) to persuade the Defendant, and having thus obtained the lease has executed separate agreements to them, giving them certain shares in the said lease as follows, viz., one eighth share for the Defendant's manager, *Muttaya Pillai*, in the name of his younger brother *Mayandiya Pillai*; one thirty-second share for his *Rayasam* (Clerk), *Subbramaniya Pillai*, in the name of his brother-in-law, *Sankaralingam Pillai*; five thirty-second shares for his friend *Varadaya Naikar*; and five thirty-second shares for *Kalaryar Kovil Chellama Ayar*, a friend of both the parties, in the name of his son, *Aiyairayar*. These particulars came to the Defendant's notice lately. That the Plaintiff obtained two Bonds from the Defendant (on the date of the said document) for the sum of Rs. 3,000, which he required at the time, but paid him only Rs. 500 at the time. With the aid of this money, the Defendant instituted a suit against the said gentleman in No. 4 of 1851, on the file of this Court for Rs. 23,000. The Plaintiff has subse-

quently paid to the Defendant only Rs. 52 on one occasion, and Rs. 500 on another occasion, and has executed to him an agreement of the 25th of *November*, 1851, to the effect that if he should fail to pay the rest of the amount within five days, he would return the lease and bond, and receive back the amount advanced by him. The Plaintiff, who failed to pay the money within the said time, having been demanded about the same, has stated in the presence of certain mediators that he would, according to his younger brother's advice, return the said lease, &c., and that the said sum of Rs. 1,000 and odd should be paid back. Accordingly, the said amount was ready, and the Plaintiff was searched for, but he could not be found. The Plaintiff having failed to give any pecuniary assistance according to his positive promise and concealed himself, the Defendant was obliged to pay Rs. 1,000 and odd for *Madara Ramakristna Chetti's* precept through Mr. *Fondclair*, and to withdraw the said suit No. 4; and the Defendant's grove of tamarind trees and *karamal* (tanks), which can yield Rs. 5,000 per annum, were sold at auction."

From the singularly loose and inexact character of the pleadings, it is scarcely possible to discover what were the precise questions intended to be raised between the parties, and no copy of the issues is to be found amongst the printed proceedings.

It is clear, however, that two of the main questions of fact to be tried were:

First, whether the lease of 17th of *September*, 1851, was obtained by undue influence; and, Secondly, whether the document of the 25th of *November*, 1851, was a genuine document.

Another question arose as to the payment of the

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Rs. 3,000 by the Plaintiff to the Defendant, which although not decisive of the suit, has yet an important bearing upon the genuineness of the document upon which the case principally, if not altogether, depended. The Plaintiff rested the proof of his case entirely upon the lease of the 17th of *September*, 1851, and the two Bonds of the same date executed by the Defendant, in which the advance of the Rs. 3,000 before their execution is distinctly admitted, and also upon the order to the inhabitants to pay to the lessee or his agents, after the commencement of the lease, the whole revenue of the *Zemindary*.

The Defendant, in support of the allegation in his rejoinder, produced a document, dated the 25th of *November*, 1851, and purporting to be attested by three witnesses, and to have been engrossed by one *Appavaiyar* of *Madura*. And he called five witnesses to prove its execution. Of these, two were the persons whose names appeared as attesting witnesses, the third name being that of a person who was proved to have been dead several years, and another was *Appavaiyar*, the alleged writer of the document. All these five witnesses swore to the execution of it by the Plaintiff in their presence. In addition to this evidence, four of the witnesses stated in almost the same words, that "the Plaintiff did not act up to the conditions of the agreement. That as soon as the term of the agreement had expired, the Defendant sent for the Plaintiff and asked him to receive back the money and return the lease and the Bonds. That the Plaintiff said in a week he would send for and return the documents and receive back the money."

Upon the case thus presented the Civil Judge of

Madura dismissed the suit on the ground that the alleged lease was an executory contract, and being without consideration could not be enforced, and also that the transaction was void for maintenance.

Upon appeal to the High Court of Judicature the objections taken by the Civil Judge were overruled, and the case remanded to him to be disposed of upon its merits generally. It is perhaps unnecessary to consider the objections upon which the Civil Judge originally disposed of the case. They were very slightly alluded to in the argument before their Lordships, and are not entitled to any weight. On the return of the case to the Civil Judge, he decided upon the merits in favour of the Appellant. He thought there was no cause to question the truth of the evidence and genuineness of the document of the 25th of *November*, 1851, that the lease of the *Zemindary* was cancelled by it, and he, therefore, decreed that the Plaintiff's suit be dismissed. Upon appeal the High Court of Judicature reversed this decree, and gave judgment that the Plaintiff was entitled to specific performance of the lease, and to the possession and enjoyment of the *Zemindary* under the terms of such lease.

Before proceeding to examine the grounds of this decree, their Lordships cannot refrain from animadverting upon the inaccurate and inartificial character of the pleadings in this case.

The Plaintiff's right of action depended entirely upon the lease, which entitled him to possession of the *Zemindary;* and if that possession had been usurped by the *Zemindar*, the Plaintiff ought to have brought ejectment. The prayer of his plaint seems rather to be for an injunction to restrain the *Zemindar*

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from collecting the revenue of his *Zemindary*, against the terms of his own authority to the Plaintiff. But the High Court of Judicature appear to treat the suit as one for specific performance, which it could not be if, according to their opinion, the lease was not an executory contract. It is most desirable that such laxity of pleading should be discountenanced, as it imposes additional difficulties in the decision of a case like the present, where the utmost precision and accuracy were necessary in order to bring the parties to distinct issues.

It is evident that the whole case ultimately resolved itself into the proof of the genuineness of the document of the 25th of *November*, 1851.

This question is involved in considerable difficulty. On the one side there is the positive testimony of five witnesses, who swear to the execution of the document; and on the other, there is negative evidence of the strongest character arising from the great improbability of its ever having been executed. It must, however, be borne in mind that the *onus* of displacing the Plaintiff's case rested upon the Defendant, and in support of his appeal he ought to be able to show that the evidence he produced was so unsuspicious and satisfactory that the High Court of Judicature were not justified in making a decree against him.

The Plaintiff's evidence merely consisted of the lease of the 17th of *September*, 1851, and of the contemporaneous Bonds, and the authority from the *Zemindar* for the collection of the revenue. The Defendant rested his defence on three grounds:— first, that the lease was fraudulently obtained by the Plaintiff by means of bribing the Defendant's servants

and friends to exert their influence to persuade him to grant it; secondly, that the whole of the Rs. 3,000, the consideration for the lease, was not paid, but only Rs. 1,052, by three payments; and, thirdly, the agreement of the 25th of *November*, 1851, by which the Plaintiff agreed to return the lease if he did not make payment of the residue of the Rs. 3,000, within five days, which he failed to do.

With respect to the allegation of the improper and fraudulent mode in which the Plaintiff obtained the lease, it is unnecessary to say more than that the Civil Judge thought it was not supported by the evidence.

The question as to whether the whole of the Rs. 3,000, was advanced requires a little more consideration. The Plaintiff relied entirely upon the estoppel arising from the statement of the advance of that sum in the lease and the Bonds.

The Defendant proved that the Plaintiff paid only Rs. 500 on the date of the execution of the Bonds, and that when the agreement of the 25th of *November*, 1851, was executed, a further sum of Rs. 500, was paid. If the genuineness of the agreement of the 25th of *November*, 1851, was established, it expressly states that Rs. 1,052 only had been paid. It is difficult to reconcile the mode in which the Plaintiff conducted his suit with the idea that he had really paid the Rs. 3,000 to the Defendant. He is a Merchant at *Madura*, keeping Books, as a matter of course, in which all his transactions would be entered. He might have presented himself as a witness, have proved the advance of the Rs. 3,000, and have vouched the entries in his Books in support of his evidence. This course of proceeding would not only

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have established the honesty of his case, but have gone very far to show that the agreement of the 25th of *November*, 1851, with its statement of the advance of only Rs. 1,052, could not have been signed by him.

But notwithstanding the prejudice which arises to the Plaintiff's case from his not appearing as a witness to facts peculiarly within his knowledge, and especially to disprove his signature to the document of the 25th of *November*, 1851, that document is still exposed to all the improbabilities which surround it on every side. The Defendant's case represents the Plaintiff as so anxious to procure the lease in question that he bribed the Defendant's servants and friends to assist him in his endeavour to obtain it; and yet, succeeding in his object, as having agreed a little more than two months afterwards to surrender the right which he had acquired by such improper means, upon non-payment of a sum of Rs. 1,948, within five days, and as having been unable to raise such a comparatively small sum to save this valuable interest from forfeiture.

It is a circumstance worthy of remark that the lease was registered immediately after its execution, but the alleged document of the 25th of *November*, 1851, was never registered at all. Now, although it might not have been one which it was absolutely necessary to register, yet when a lease was recorded which so seriously affected the interests of the *Zemindar*, it might have been expected that an instrument which five days after its execution had actually put an end to the lessee's right to the lease, would have been placed upon the register as a matter of ordinary prudence and precaution.

One circumstance of improbability suggested by the High Court of Judicature must be dismissed as having arisen from a misapprehension of the facts. They say, "The lease in issue was on a stamp, the instrument to cancel it is on unstamped paper; and it is highly improbable that the precautions taken in this respect to fortify the lease should not have been adopted to strengthen and place as far as possible beyond question an instrument obtained to make void the lease, if such instrument were genuine." The fact, however, is, that both the lease and the instrument were originally without stamps, and upon both the penalty was paid for stamping them to render them admissible in evidence.

But a further improbability arises from the circumstance that after the Defendant had obtained this instrument, and the terms of it had not been complied with, he allowed the lease and the Bonds to remain in the Plaintiff's possession for upwards of six years without any attempt to obtain them from him, except what he states in his rejoinder, "That the money he was to pay back was ready, and the Plaintiff was searched for and could not be found." There is no evidence of this alleged fact, and it is highly improbable that the Plaintiff, who was carrying on business at *Madura*, should have eluded the Defendant's search during so many years. But if he was thus continually endeavouring to escape the fulfilment of his undertaking, it is the more extraordinary that the Defendant should not have instituted a suit against him to compel him to deliver up the lease and the Bonds upon payment back of the money he had received, and which he alleges that he was ready to pay.

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But all these improbabilities are as nothing, in comparison with that which arises from the conduct of the Defendant in the present suit. The object of this suit is to obtain a decree to enable the Plaintiff to collect all the revenue of the *Zemindary*, to which he claimed to be entitled under the lease granted to him by the Defendant.

If the Defendant's case founded upon the document in question was a true one, he had a short and conclusive answer to the Plaintiff, and it is not unfair to presume that it would at once have been brought forward. It is not pretended that there is any distinct allusion to such a document in the Defendant's answer, but certain vague and doubtful expressions are relied upon, as showing that it must have been in existence at this time, although not specifically mentioned. But if this were the case it is most unaccountable, that the Defendant should have left this complete answer to the Plaintiff's case to the last stage of his pleadings, and even then have introduced it almost incidently as part of a narrative of the transactions between them.

One other circumstance may be mentioned as prejudical to the notion of this being a genuine document. The Defendant himself put in evidence a Bond, dated the 1st of *September*, 1856, executed by *Mutta Pillai* to the Plaintiff for the payment of a sum of Rs. 250, within ten months, from the profits derived from one eighth share of the *Zemindary*, and from the income of his own lands. The lease of the *Zemindary* was to commence in 1857, and *Mutta Pillai* would then be put in possession of his share. *Mutta Pillai* was the manager of the Defendant, and it is hardly possible to believe that if the

document in question had ever been executed it should have been unknown to him, and that he should have been dealing with an interest in 1856 which had ceased to exist in 1851.

All these strong improbabilities the Defendant had to overcome before he could fairly expect that reliance would be placed upon witnesses, however numerous, to the execution of a document upon which his own conduct had thrown so much suspicion. All the facts were within his own knowledge, and yet he did not tender himself as a witness to strengthen the evidence which both from the station of the witnesses produced by him, and from the general character of their testimony, is extremely untrustworthy. No satisfactory explanation was even attempted of any of the extraordinary circumstances accompanying and following the supposed agreement, and the effect of them is not to be weakened, much less avoided, by the observation of the Civil Judge, that "there is no accounting for a native's acts." Their Lordships think that the High Court of Judicature were warranted in their conclusion, that "upon consideration of all the circumstances affecting the credibility of the witnesses and the whole of the evidence, together with the probabilities and improbabilities of the case, the document had not been proved to be a genuine and binding instrument."

In adopting this view their Lordships are anxious to preserve to the Appellant all the rights which arose to the *Zemindar* out of his dealings with the Respondent. Although the Respondent may be entitled to possession under the lease, yet it may be at least questionable whether the transaction did not

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operate merely as a security for the money advanced, and agreed to be advanced, and whether the *Zemindar* would not have been entitled to redeem. Again, the unwillingness of the Respondent to appear as a witness, knowing that it was not only asserted that he had not advanced the full sum agreed upon, but also that he was charged with imposition and fraud, makes it extremely doubtful whether the *Zemindar* ever received the whole amount of Rs. 3,000. Their Lordships will, therefore, humbly recommend to Her Majesty that the decree of the High Court of Judicature in favour of the Respondent for possession of the *Zemindary* under the terms of the lease be affirmed with costs, but with a declaration that it is to be without prejudice to the claim for redemption (if any) to which the Appellant may be entitled, and to any question which may be raised as to the amount actually advanced to the *Zemindar* by the Respondent.

PRANKISHEN PAUL CHOWDRY - *Appellant,*

AND

MOTHOORAMOHUN PAUL CHOWDRY - *Respondent.**

On appeal from the Sudder Dewanny Adawlut at Calcutta.

15th Dec. 1865.

An adult brother, a member of a joint undivided Hindoo family, in consequence of disputes, separated from the family. As no regular partition of the estate was made, the lands remained undivided, and each member took his share of the rents. After a short separation, the brother returned to the family, and it was by a deed of *Ungshoputtur*, or settlement, agreed that the acquisitions made by the elder brother during the separation should go into the joint funds. During the separation the elder brother purchased a *Putnee Talook*. Held, that the reunion of the brother to the family remitted him to his former *status*, as a member of a joint Hindoo family, and that he was entitled to share in the purchase, as it must be presumed to have been made out of the funds of the joint estate.

The presumption of Hindoo law is, that property not shown to be separate is joint, and the *onus probandi* lies on the party claiming it as separately acquired.

THE parties to this appeal constituted a joint undivided Hindoo family. The suit was brought by the Appellant in the *Zillah* Court at *Nuddea* against his brother, *Nobokishen Paul*, deceased, and now represented by his son, the Respondent, to recover, after crediting the Defendant with certain moneys paid, a balance of Rs. 8,244. 8a., together with interest thereon, making together the aggregate sum of Rs. 16,489 alleged to be owing from him, in respect of the moiety of the purchase money of a *Putnee Talook;* after an account taken of the reception of the rents

* Present: Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

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of the family property in which it was alleged the Appellant and *Nobokishen Paul Chowdry* held equal undivided moieties.

The Respondent's defence was, that the *Putnee Talook* had been purchased out of the joint family acquisitions; and upon that issue the case was tried by the Principal *Sudder Ameen*. The suit was dismissed by that Court, as well as by the *Sudder Dewanny Adawlut* to which an appeal was made, and from whose judgment the present appeal was brought.

The question turned upon the effect of the evidence adduced. The general facts, as well as such parts of the evidence essential to the comprehension of the case, will be found in the judgment of their Lordships.

Mr. *Rolt*, Q.C., and Mr. *Leith*, for the Appellant,

Contended, that the case made by the evidence was, that the purchase of the *Putnee Talooks* in question was made by the Appellant, and that the Respondent was a sub-purchaser of a moiety from the Appellant; thereupon he became liable for the payment of one moiety of the purchase money, and that though the Defendant pleaded that the purchase money was paid by the Appellant out of their joint moneys, and, therefore, nothing was due from him in respect of the sub-purchase, yet he had failed to establish such fact by evidence, and they insisted that the Respondent was estopped from entering into evidence on that point by a deed of *Ungsho-puttur*, or settlement, of the 28th of *July*, 1848, made between the Appellant and the Respondent's father.

The Attorney-General (Sir *R. Palmer*, Q.C.), and Mr. *W. H. Melvill*, appeared for the Respondent, but were not called upon by their Lordships, whose

Judgment was delivered by

The Right Hon. Sir JAMES W. COLVILE.

Their Lordships are of opinion that no ground has been shown for disturbing either of the decisions below, and, therefore, they do not think it necessary to call upon the Respondent's Counsel.

The case turns almost entirely upon the construction to be given to the deed of *Ungshobodhareet Puttur*. That deed not only defines the rights and obligations of the parties, but it contains a narrative of the facts of the case upon which we can rely, as it is a statement in which both parties joined, at a time when there was apparently no difference between them.

It appears, then, from that deed, that this was a joint Hindoo family, consisting of the Appellant, and the Respondent, and a younger brother of the half blood, who was a minor, and is since deceased. They were, in all respects, a joint and undivided family. In the year 1254 *B.E.*, there were disputes between the adult brothers, and they separated, but there was no regular partition of the estate. The effect of the separation was that the lands remained undivided, but each brother, being no longer a member of a joint Hindoo family, took his share of the rents.

It appears from other parts of the Record, and although it is not very distinctly stated in the deed,

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it would almost follow from the nature of the case, that the younger brother had then a large claim against the elder brother, who had been the manager of the estate, in respect of the rents and profits received previous to the partition. That is stated distinctly in the judgment of the *Sudder* Court, where the Judges say, "We find that the Plaintiff's Pleader admits that up to 1253 his client, as elder brother, made all the collections, and held all the joint funds of the family. That although a separation took place in 1253, and the Plaintiff was bound to give a full and honest account of his management, no such accounts were ever rendered for the satisfaction of the brother Defendant."

The separation of the two brothers continued for little more than eleven months; they then agreed to come together again, and this deed was executed. The deed states that, during that period, the elder brother had entered into a treaty for the purchase of the *Putnee Talook*, the price of which is the subject of the present contention; and further, that the youngest brother having died, and his mother having taken his share by inheritance, *Prankishen Paul Chowdry* had purchased that share from her, subject to an annual payment of Rs. 1,200.

On the reunion of the two brothers, which of itself remitted them to their former *status* as members of a joint Hindoo family, it was expressly agreed that those acquisitions which the elder brother had made whilst the separation continued, should all go into the joint fund, and the deed provides the terms upon which that should be done.

Now, the material parts of the deed with respect

to these transactions are these: first, there is a recital "that I, *Prankishen Paul Chowdry*, by contracting loans, negotiated to take in *Putnee Turruff Munsebpore* and *Dhee Rajapore, benamee* in the name of my relative, *Sumboodchunder Singh*, inhabitant of *Dowlutgunge*, and advanced the *byana*, or earnest money." Then it states, "Afterwards a settlement was effected between us brothers, and again the entire property came into our *ijmallee* possession, as it had been before, and the *Putnee*, &c., that had been recently purchased also came under the *ijmallee* settlement, and of the balance of the consideration or purchase money of the aforesaid *Munsebpore*, &c., taking no *putnee*, some was paid by us two from our private funds and some portion by loans raised in bonds given by us respectively, and by granting *durputnee pottahs*, and we obtained a *Pottah* of the said *Putnee*, and both brothers remained in *ijmallee* possession, having taken from the aforesaid *Singh* an *ikrar* or acknowledgment of the *benamee*; at present we two brothers have brought under *ijmallee* the entire hereditary and acquired property, and that which has been recently acquired as *putnee*, and all real and personal property, have made this condition and settlement that from hence the whole is to remain *ijmallee*, and that such property of the share of *Ramkishen Paul* as I, *Prankishen Paul*, had purchased and held under a perpetual *Pottah* was likewise to become *ijmallee* and held by us in possession in equal shares, and that we two brothers will pay the profits of the said property to our step-mother, and that whenever we, or our heirs, share and take the aforesaid and other property, we, or our heirs in such case, shall equally share and take our said deceased half brother's property, and not

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more, and the shares of the same shall never be more or less."

In short, it is expressly provided that the entire property, whether ancestral, or then acquired, or thereafter to be acquired, is to be joint, and enjoyed in equal moieties. Then follow certain directions for the management of this joint estate, including provisions for giving the elder brother a larger share in such management, all of which are immaterial to the present case.

Then follows that which appears to their Lordships to be one of the most important provisions in the deed. It is to this effect, "All the money that has been borrowed on our joint Bonds, and that which I, *Prankisher Paul*, had borrowed during the time of our separation, on bonds given in my own name, and which said money has been paid as the consideration or purchase money for the *putnee* of *Turruf Munsebpore* and *Dehee Rajapoor*, shall all be accounted as our *ijmallee* debt, and the said *ijmallee* debt shall be liquidated by us out of the profits of the *ijmallee* property." As their Lordships understand that stipulation, it provided that whatever *Prankishen Paul* had borrowed on Bonds given in his name, or whatever the two had borrowed on their joint security, in order to provide the consideration money paid for the purchase of these two *Putnees*, should be a charge on the joint estate, and should be liquidated out of the joint property; but they can find in that no provision whatever for the repayment, out of the joint property, to the elder brother, of any funds which he might have advanced, or might have alleged that he had advanced, on the same account, out of his private money. The deed is, upon that

point, entirely silent, and, as one of their Lordships observed in the course of the argument, it would be a strange thing to infer from this silence an implied promise to pay the sum sought to be recovered in this suit.

Then follow provisions to which we shall afterwards refer, providing for the event of a subsequent disagreement between the parties, and a second partition, and then comes this stipulation:—"No party shall make any claim hereafter upon the other on account of any cash having reference to the former *ijmallee* period, that is, for the time anterior to the year 1254 B.S. *I, Prankishen Paul,* have no claim upon you, *Nobokishen Paul,* on account of the price of the real and personal property of *Ramkishen Paul's* share, for which I had obtained a perpetual *Pottah,* and which I had obtained in the way of a purchase, and whatever writings have been executed and given by me to our step-mother, we both shall be bound to comply with the conditions thereof." Now, those last words show that although *Prankishen Paul* may have paid out of the money which he had collected formerly, or out of private resources, or in any way, for the share of his half brother, yet he throws all that into the joint concern, and there is no claim to be made upon the younger brother in respect of that acquisition. That is express. Again, there is, no doubt, a general covenant or agreement that no claim shall be made upon him in respect of any moneys for which he may have been accountable in respect of those earlier collections. And Mr. *Leith* relies upon that as an answer to that portion of the Respondent's case which rests upon the assumption that the moneys which are in dispute

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came out of these former collections, and were applied by *Prankisken Paul* to the purchase of the *Putnee Talooks*. But it seems to their Lordships that the whole deed must be taken together, and as one general compromise; and if they are right in their construction of the former clause, that there was no provision made for the payment, or the adjustment of the price of the *Putnees*, except in so far as it consisted of borrowed money, which was to be paid out of the assets of the joint estate; then, when they find afterwards an agreement that there shall be no account in respect of the former collections, the two must be taken together, and must be construed to import that whilst, on the other hand, the elder brother makes no claim in respect of any moneys which he may have applied in that way, so, on the other hand, the younger brother says, I will make no claim for any monies *ultra* that, and I will treat the whole account as settled and closed by this arrangement.

Therefore, upon this deed if it stood alone, it would be very difficult to say how the present claim could be supported.

We find, however, that the case which the parties contemplated really happened, and that after a short period of reunion they again separated, and the deed of partition, which, though not printed in the record, has been produced to-day and is now before us, was executed. We find in that deed no provision at all for such a claim as this, while we do find a provision for the payment of those debts which, upon the construction which we have put upon the clause, really would fall upon the joint estate. That provision imports, "that the money borrowed under simple

and mortgage Bonds is to be liquidated by both in equal portions." Therefore, the subsequent deed of partition seems to be entirely consistent with what was contemplated by the former deed, and does not in any way re-open any of the accounts settled by that deed.

It would, then, as it seems to us, be extremely difficult to support the case made by the Appellant, even supposing that the funds in question were really his private funds. If, indeed, the sums mentioned in the *jumma khurruch*, which seems to have been used originally to meet the fraudulent claim of the trustee, to hold the *Putnee Talooks* as his own, if those sums, though described as coming from the private funds of the Appellant, had been alleged and proved by him in this suit to have been money actually borrowed on Bond or otherwise, and had been so brought within the stipulation of the deed, the case would have been very different. But no such issue was raised by the Appellant.

The issue of fact upon which the parties went to trial was raised by the other side, and, as ultimately settled, was this, "whether it was true that the Plaintiff had, out of his own funds, paid the sum of Rs. 20,120, or that the said amount had formed a part of the *ijmallee* funds of the two parties." The Appellant gave no evidence on this issue; the Respondent examined four witnesses upon it, and it was found in his favour. Their Lordships have no doubt of the propriety of that finding. It is not even alleged upon these proceedings, that the parties originally had any separate property; the presumption of Hindoo law in such cases is, that property not shown to be separate is joint; and it is an

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admitted fact that the Appellant was long in the management of the joint estate, had received the collections from it, and was accountable for them to his younger brother. And if the moneys employed in the purchase of the *Talooks* formed part of those so drawn from the joint estate, it follows that the Respondent on the reunion was entitled, upon the general principles of Hindoo law, and independently of the express provisions of the deed, to share in them, as acquisitions made by the use of the joint funds.

Their Lordships are, therefore, of opinion that the decree of the Courts below were right; and they have no difficulty in determining humbly to recommend to Her Majesty that this appeal be dismissed with costs.

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

SHEONATH, *alias* BURRAY KAKA - *Appellant*,

AND

RAMNATH, *alias* CHOTAY KARA *Respondent*.*

On appeal from the Court of the Judicial Commissioner of Oude.

28th Nov. 1865.

IN this case the suit was instituted by the Respondent against the Appellant in the Court of the Civil Judge at *Lucknow*. The parties were cousins, natives of *Lucknow*, jointly interested in certain ancestral

No power is vested in the Court of the Civil Judge at *Lucknow*, under the provisions of secs. 312 and 314 of the Code of Civil Procedure (Act, No. VIII. of 1859), which is in force in *Oude*, to refer nominated by

* Present:—Members of the *Judicial Committee*, The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

the decision of any issue raised in a suit to Arbitrators the Court against the protest of one of the parties.

An Award, founded on such a reference, held on appeal, not binding on a Defendant and set aside, as the parties must either name the Arbitrators, or consent to the nomination of them by the Court.

A party is not bound to appeal from every interlocutory Order which is a step in the procedure that leads to a final decree. It is open on appeal from such final decree to question an interlocutory Order.

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estates. They also carried on business in co-partnership as Bankers and Merchants. The business in which they were engaged was carried on by them in three *Kothees*, or Firms, styled *Hurjus Roy & Gungaram*, and two other names. Disputes arose between them, and, to a certain extent, a partition of the joint property was made, leaving open the debts due to the Firms up to the date of the partition. *Farighkhuttees*, or mutual releases, were executed upon that footing. Notwithstanding this partition, the disputes between the parties relative to their rights continued, and after an ineffectual attempt to settle these disputes by a reference to Arbitrators, which was never carried into effect, the Respondent instituted the present suit against the Appellant. By the plaint, a general account and partition was prayed for, on the allegation that no account had been settled between the parties, and that the releases given on the execution of the before-mentioned arrangement were not operative, as no partition had taken place.

The suit went through its various stages; but as the material question on appeal was narrowed to a single point, namely, whether it was competent to the Court under the Civil Procedure Act, which is in force in *Oude*, to refer one of the questions at issue to Arbitrators nominated by the Court, against the protest of the Defendant, it is not necessary further to state the proceedings, which are fully detailed in their Lordships' judgment.

The Civil Procedure Act of the Legislative Council of *India*, No. VIII. of 1859, entitled "An Act for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter," secs. 312 and 314, upon which this question was decided, provide as follows :—

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By section 312, it is enacted, that "If the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters, shall be referred to the final decision of one or more Arbitrator or Arbitrators, they may apply to the Court at any time before final judgment for an order of reference," and

Section 314, declares that "The Arbitrator or Arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the Arbitrator or Arbitrators, or if the person or persons nominated by them shall refuse to accept the arbitration, and the parties are desirous that the nomination shall be made by the Court, the Court shall appoint the Arbitrator or Arbitrators."

The Respondent put in no appearance to the appeal, which was, consequently, heard *ex parte*.

The Attorney-General (Sir *R. Palmer*, Q.C.), and Mr. *Leith*, for the Appellant.

As the Appellant refused to agree to the persons nominated by the Judge of the Civil Court as Arbitrators, upon the issue referred to them, the Award is not binding on him. The Arbitrators were, in the absence of the Appellant's consent, never legally appointed, so as to enable them to act as Arbitrators; Code of Civil Procedure, Act, No. VIII. of 1859, secs. 312, 314. The Award, therefore, must be set aside and the case remitted to the Court below.

Judgment was reserved and now delivered by

22nd Dec. 1865.

The Right Hon. Sir JAMES W. COLVILE.

The Appellant and Respondent are first cousins,

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and natives of *Lucknow*, and were formerly jointly interested in certain ancestral property, and in the business of three *Kothees*, or Firms, the styles of which were *Hurjus Roy & Gungaram, Gungaram & Juggurnath, Sheonath & Ramnath.* Each appears to have been also possessed of separate property.

In 1859 they made a partition, as far as they then could, of their joint property; and on the 16th of *September* of that year they interchanged *Farighkhuttees*, or instruments of mutual release, of which that executed by the Respondent, after stating that the two parties were jointly interested in the beforementioned firms, and had settled the accounts of them amicably, and had made an equal division of the entire ancestral property, moveable and immoveable, cash, promissory notes, &c.; and after formally abandoning all claims on account of the said firms against the Appellant and his heirs,—contained this passage, "But I have a claim to an equal share of such moneys as may be realized on account of debts due to these Firms on this date, and I also hold myself liable for a moiety of such sums as may be due by these Firms up to this date."

In 1861 there was a dispute, the precise nature of which is not disclosed, between the cousins respecting the division of the paternal estate, and the debts due to or by the Firm of *Sheonath & Ramnath;* and they agreed to refer the matters in dispute to the arbitration of five persons, named *Hyder Hosein Khan, Meer Wajid Ali,* Mr. *Jacob Johannes, Sah Mukhun Lall,* and *Girdharee Lall.* A written agreement to this effect was executed by each on the 8th of *May,* 1861; but the Appellant afterwards drew back from his agreement, and refused to have it registered; and

nothing came of this attempt to settle the dispute by arbitration.

In *September*, 1861, the Respondent, *Ramnath*, instituted this suit against the Appellant. The plaint sought a general account and partition; it alleged that no account had ever been settled between the parties; it mentioned the execution of the *Farighkhuttees*, but alleged that there had been no partition, as stated in them; that the partition was intended to take effect after a settlement of accounts, when the *Farighkhuttees* were to have been registered; and that, in the meantime, they had remained with the Appellant as incomplete instruments. It referred, also, to the agreement for a reference to arbitration, but only as evidence that the whole property still remained undivided.

The cause was tried by the Civil Judge of *Lucknow* (Mr. *E. G. Fraser*), with the assistance of a jury, and his decree, founded on the findings of the jury, established that there had been an actual partition and division of the joint property; that the *Farighkhuttees* had been executed on the footing of it, without taint of fraud, and that the Respondent had failed to prove that he had any interest in a fourth Firm which the Appellant carried on under the style of *Ramnath Rughonath*. It also decided against the Respondent a question in the suit touching the profits made by the Appellant by means of sale and purchase of Government notes during the rebellion.

The Respondent appealed against this decision to Mr. *Campbell*, then the Judicial Commissioner, who by his Order of the 15th of *May*, 1862, affirmed it on all the points raised by the appeal. His judgment, however, contained these passages: "But it seems

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clear that there is one account between the parties still quite unadjusted, *viz.*, the division of the outstandings, which was left open at the time of the division of assets. I think it would be proper that a sum in satisfaction of all claims on this account should be awarded to Plaintiff, so as to settle the matter, and I remit the case to the Judge to decide that point. If possible, a decision should be obtained from the arbitrators previously appointed by the parties." And again, "There was something very considerable to be settled that still remains to be settled, and I trust that, in accordance with my Order, the Judge will manage, by a successful arbitration, to give the Plaintiff a fair equivalent for his share in the outstandings of the three firms."

The effect, therefore, of this Order was conclusively to limit the claim of the Respondent to his share in the outstandings of the three Firms; and to direct, or at all events to suggest, that that claim should be enforced not by taking the accounts upon the footing of the *Farighkhuttees* in the regular way; but by giving him a lump sum as the value of his interest therein, and that such value should be fixed by the Award of the Arbitrators to whom the parties had formerly proposed to refer their disputes.

The cause being thus remitted to the Civil Judge, that Officer, on the 7th of *June*, 1862, made an Order, whereby he referred to four out of the five Arbitrators formerly named (the fifth, *Girdharee Lall*, having left *Lucknow*) the decision of the following questions: first, what accounts remained unadjusted between the parties; second, what amount of outstandings remained then unrealized and undivided; third, what amount should be given to the

Plaintiff (the Respondent) as an equitable acquittance of his share therein. He directed the Arbitrators to file their award within two days, and empowered them, should they be equally divided in opinion, to elect an umpire.

The Appellant did not acquiesce in this Order. On the 10th of *June*, 1862, he petitioned the Judicial Commissioner against it. In his petition he stated, that he had no objection to the Order of the appellate Court referring the question of joint but divisible debt to arbitration, but that he objected, on the grounds therein stated, to the Arbitrators to whom the Civil Judge had referred the case, and requested that other Arbitrators might be selected by the parties, and that his case be referred to them. The Order of the Judicial Commissioner on this petition was in these words: "It is in the Judge's discretion to employ the Arbitrators formerly named by the parties, or to arrange new ones if he can. I do not think it possible that a complicated account can be settled by a jury."

The Appellant being thus referred back to the Civil Judge, presented on the 13th of *June* a petition to that Officer, in which he reiterated his objections to the Arbitrators named, and begged the Judge, as authorized by the Judicial Commissioner, to dismiss them, and to order "other Arbitrators to be named, composed of such parties as I and the Plaintiff may select." This application was on the 23rd of *June*, 1862, rejected by the Judge, who gave the following reasons for his decision: "I see no reason to change. I acted on the Judicial Commissioner's Order, and transferred the case to the old *Punches*. If their work, when it comes in, prove open to suspicion, or

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is anywise unsatisfactory, I shall not decide upon it, but I think it desirable to have the fullest light they can throw on the matter. If they are partisans, and go in favour of Plaintiff unduly, they will still have to show grounds. If they go against the Plaintiff, whose friends they are said to be, it will be all the more satisfactory to the Defendant." Against this last Order the Appellant appealed by petition dated the 25th of *June*, 1862, to the Judicial Commissioner, whose order thereon was in these words, "I will not interfere in this stage."

The Appellant afterwards, and before any Award was made, presented two further petitions to the Civil Judge. The first of them is dated the 22nd of *July*, the other the 19th of *August*, 1862. In these, after referring to his ineffectual protests against the nomination of the particular Arbitrators, and to the determination of the Judge not to change them unless they proved themselves partial and unfair, he objected to their mode of proceeding. And in the last petition, he expressly asked that their Award might be set aside, and that new Arbitrators might be appointed in their stead, by which means justice might be done him.

The Arbitrators filed an Award about the 20th of *August*, 1862, on which day it was returned to them by the Judge for amendment as to its form. It was filed in its amended form on the 25th of that month. Its effect was, that the amount which the Respondent could fairly claim from the Appellant in respect of the outstandings was Rs. 66,090, besides one moiety of a judgment debt which had been recovered in the Civil Court of *Cawnpore*, and was described as the "*Rusdhan* decree."

On the 4th of *September*, the Award was discussed before the Civil Judge. He overruled the Appellant's objections to it; observed that it did not include the sums due to the firms on mortgage, and that the question to what the Plaintiff was entitled in respect of these must be referred back to the Arbitrators. His decree was to this effect: "I accept the decision of the Arbitrators, awarding Rs. 66,090 to the Plaintiff as equivalent for all outstandings except the mortgages, and half of the *Rusdhan* decree."

Against this decree the Appellant, on the 16th of *October*, 1862, appealed to the Judicial Commissioner. The Order passed by him on the following day was in these words: "Case is not completed; appeal will be heard when the whole is complete."

On the 20th of *December*, 1862, the Arbitrators, to whom a fifth (*Ihtimamood Dowlah*) seems to have been added, made their Award in respect of the mortgages. The effect of it was that a further sum of Rs. 15,000, should be paid on this account to the Respondent by the Appellant.

On the 22nd of *December*, 1862, the Civil Judge adopted this finding in spite of the Appellant's objections, and ordered that he should within three months make good this sum, as well as those which by the decree of the 4th of *September*, he had been ordered to pay.

The Appellant appealed also against this decree to the Judicial Commissioner. His petition of appeal, which is dated the 16th of *March*, 1863, states, amongst other things, that the Arbitrators had been challenged by him both in the Lower Court and in the Judicial Commissioner's Court. This appeal, and that against the decree of the 4th of *September*,

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1862, of which the consideration had been postponed, was brought before Mr. *Couper*, who had then become Judicial Commissioner, in the place of Mr. *Campbell*, and he, on the 3rd of *July*, 1863, upheld the Awards of the Arbitrators, and affirmed both the decrees of the Civil Judge.

Against this decision the present appeal is brought.

Their Lordships will assume, and such is, in fact, their opinion upon the facts before them, that if the questions which the Arbitrators have determined were properly referred to them, no sufficient grounds for impeaching their Award have been established. It has, however, been strongly urged at the Bar that it was not competent to the Judicial Commissioner, except with the consent of both parties, to vary, as he did vary by his Order of the 15th of *May*, 1862, the rights of the parties under the *Farighkhuttees*, and to impose on the Appellant the obligation of purchasing the Respondent's interest in the outstandings on a rough estimate of its value. Another objection to the proceedings—and it is that on which the petition of appeal chiefly insists—is that the nomination of the particular Arbitrators by the Judge, without the consent and against the repeated protests of the Appellant, was altogether irregular, and that their Award is, therefore, not binding upon him.

Their Lordships do not deny the force of the arguments addressed to them on the first point, but they are nevertheless of opinion, that the determination of this appeal must depend upon the validity of the second objection; because if the nomination of the Arbitrators were regular, there is evidence in the petition of the 10th of *June*, and in other parts

of the proceedings, that the Appellant accepted the issue proposed by the Judicial Commissioner, and was willing that the accounts between him and the Respondent should be settled on that principle and by arbitration.

That both points are open to the Appellant, although he has in terms appealed only against the final decision of the Civil Judge and the confirmation of it by the Judicial Commissioner, is, we think, established by the case of *Maharajah Moheshur Sing* v. *The Bengal Government* (7 Moore's Ind. App. Cases, p. 302) (*a*). The appeal is, in effect, to set aside an Award which the Appellant contends is not binding upon him. And in order to do this he was not bound to appeal against every Interlocutory order which was a step in the procedure that led up to the Award.

Was it, then, competent to the Judge to refer the decision of this question to Arbitrators selected by him against the will and in spite of the repeated remonstrances of the Appellant? When the suit was commenced, the powers and procedure of the Courts in *Oude* were still regulated by the Rules and Ordinances which had been passed by the Governor-General in Council in order to provide for the administration of justice in that Province on its first annexation? These were substantially the same as those which had previously been in force in the *Punjab*, and were known as the *Punjab* Code. But on the 6th of *August*, 1861, the Governor-General in Council, by a notification issued under the 385th section of Act, No. VIII. of 1859, extended to the Province of *Oude* the provisions of that Act

(*a*) See also Forbes *v.* Ameeroonissa Begum, *ante*, pp. 340, 346.

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(which is generally known as the Code of Civil Procedure), subject to certain exceptions and provisions, as from the 1st of *January*, 1862. The exceptions are only five in number; they are modifications of the 3rd, 17th, 111th, 172nd, and 205th sections of the Act, and none of them have any bearing on the questions raised by this appeal. At the date, therefore, of the Judicial Commissioner's Order of the 15th of *May*, 1862, the Code of Civil Procedure had thus been extended to and was in force in *Oude*.

The 388th section of that Code provides that from and after the time when this Act shall come into operation "in any part of the British territories in *India*, the procedure of the Civil Courts in such part of the said territories shall be regulated by this Act, and except as otherwise provided by this Act, by no other law or Regulation." The only exception as to suits pending at the time when the Act shall come into operation is contained in the preceding section, and is in these words: "If in any suit pending at the time when this Act shall come into operation, it shall appear to the Court that the application of any provision of this Act would deprive any party to the suit of any right in reference to the procedure of the suit, whether of appeal or otherwise, which, but for the passing of this Act, would have belonged to him, the Court shall proceed according to the law in force before this Act takes effect." There is no expression upon the face of the proceedings of an intention on the part of the Judges below to suspend or modify the operation of Act, No. VIII. of 1859, by virtue of the provisions last quoted, or otherwise. Nor is it easy to see how the compulsory reference to arbitration which is here

complained of could have been brought within the definition of a right belonging to the opposite party. Moreover, that party himself, in the proceeding, appealed to certain sections of the Act as establishing the finality of the Award, thereby admitting that the reference was to be taken as made under the new procedure. Any larger powers, therefore, which the Judicial Commissioner and his subordinate may have possessed under the *Punjab* Code must be held to have been suspended on the 15th of *May*, 1862; and the only question is whether the subsequent proceedings were authorized by the Code of Civil Procedure.

The 312th section of the Act provides, that if the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters, shall be referred to the joint decision of one or more Arbitrator or Arbitrators, they may apply to the Court at any time before final judgment for an order of reference. The 314th section provides, that the Arbitrator or Arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the Arbitrator or Arbitrators, or if the person or persons nominated by them shall refuse to accept the arbitration, and the parties are desirous that the nomination shall be made by the Court, the Court shall appoint the Arbitrator or Arbitrators.

These sections clearly import that the parties must either name the Arbitrators or consent to the nomination of them by the Court. They are the only provisions which bear upon the subject; and it follows that the Code gives no authority to the Court to force upon a reluctant party the decision of any

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question in the cause by Arbitrators selected at its discretion. It may be observed that the *Punjab* Code, Part II., sec. 2, cl. 15, seems to require, as might be expected, equally with the Code of Civil Procedure, the consent of the parties to a reference to, and the appointment of, Arbitrators.

Their Lordships need hardly observe, that if the appointment of the Arbitrators in this case was irregular, the irregularity was in no degree cured by the fact that they were four out of five persons to whom the Appellant had on a former occasion agreed to refer the matters then in dispute between him and the Respondent. That agreement to refer had proved abortive; the Respondent's suit was not brought to enforce it, but for the determination of the rights of the parties by the Court; and the question referred to the Arbitrators was an entirely new question, suggested by the Judicial Commissioner.

Again, the appeal having been heard *ex parte*, their Lordships have felt bound to consider, whether this case could be brought within the principle of those authorities, which establish that a defect in the nomination of Arbitrators, may be cured by the waiver implied from the act of the party in going in before them, and taking his chance of a favourable decision. Their Lordships are, however, of opinion that the Appellant cannot be held to have forfeited in this manner his right to question the validity of these awards. From what has been already stated, it appears that his protests and appeals were frequent, and were repeatedly rejected as inadmissible by the Judges. Whatever part he took in the proceedings before the Arbitrators, he must be deemed to have taken under a continuing protest, and in self-defence.

Their Lordships, therefore, however much they regret the necessity of re-opening this litigation, feel bound to allow the present appeal.

It is not improbable that the decrees impeached give no more to the Respondent than upon a proper adjustment of the accounts will be found to be his due. But this result has been reached by referring a question which involves a compromise of the strict legal rights of the parties, to Arbitrators who were not duly authorized to determine it. The consent of the Appellant was essential both to the form of the issue, and to the constitution of the Tribunal that was to decide it. It was wholly wanting to the one; if given at all to the other, it was, at most, a qualified consent.

The only remaining question is, with what directions this cause should be remitted to the Courts below? It will, of course, be open to the Judge, if both parties consent, to refer the question suggested by the Order of the 15th of *May*, 1862, or any other question directed to the ascertainment of their respective rights in the outstandings, to Arbitrators duly appointed under the Act, No. VIII. of 1859. But if the parties do not consent to any such mode of settling their disputes, it will be the duty of the Judge to adjust the accounts still unsettled between them in the regular way, by taking an account of the debts which were due to and from the three Firms at the date of the *Farighkhuttees*, and of what has been received and paid in respect thereof, and by whom; and by inquiring whether any and which of the debts due to or from the said firms, remain outstanding and unpaid respectively, and by ascertaining what, upon the result of these accounts, is

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due from either and which of the parties to the other of them. Act, No. VIII. of 1859, sec. 92, seems to give to the Court the power of appointing a Receiver if one should be necessary.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the Judicial Commissioner of the 3rd of *July*, 1863, and that of the Civil Court of *Lucknow* of the 4th of *September*, 1862, and to remit the cause to the Judge, with directions to wind up the outstanding concerns of the three Firms pursuant to the *Farighkhuttees*, unless the parties shall consent to any other mode of determining their rights in these outstandings. Their Lordships think that the Appellant is entitled to the costs of this appeal, and also to the costs of the Order of the 15th of *May*, 1862, and of the proceedings following upon it.

TAYAMMAUL - - - - - *Appellant,*

AND

SASHACHALLA NAIKER AND VIRASAMI NAIKER - - - - - *Respondents.**

On appeal from the Sudder Dewanny Adawlut at Madras.

28th, 29th, & 30th Nov., 1865.

In a suit, which involved a disputed question of fact as to an alleged adoption and the due execution of a Will, the Court in *India* disregarding other evidence, relied solely upon the evidence of a witness examined at the instance of the Court itself. The effect of the evidence of this witness was to show that at the time of the adoption and execution of the Will, the alleged Testator was in a dying state, and, although at times roused to consciousness, was, from his enfeebled mind, incapable of understanding the acts he was represented to have performed: the Court below, however, upon the evidence of this witness, as to his testamentary capacity, corroborated, as it thought, by a letter of the widow of the alleged Testator, recognizing the adoption, and by her acquiescing in the performance of certain funeral rights of her deceased husband by the supposed adopted son, pronounced both the adoption and the Will to be valid. Upon appeal, held, that although as a general rule, in a question of fact, the Judicial Committee were unwilling to disturb the judgment of the Court below, yet that as it was the duty of the appellate Court to weigh the evidence and probabilities, and form an independent judgment, and taking into consideration the evidence regarding the state and capacity of the alleged adopter and Testator, they were of opinion, that the evidence relied upon was so unsatisfactory, that neither of the decrees of the Courts below could be supported, and reversed the same with costs.

THE appeal in this case was brought from a decree of the *Sudder* Court at *Madras*, which Court affirmed a decree of the Civil Court of *Cuddalore*, in a suit instituted by the first Respondent, as guardian of the

* Present:—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

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second Respondent, a Minor, the alleged adopted son of one *Balakristnama Naiker*, deceased, against the Appellant, the widow of *Balakristnama Naiker*, and other Defendants, to recover the estate of *Balakristnama Naiker* in the possession of the Defendants. An alleged Will of *Balakristnama Naiker* was also set up, which instrument, after reciting the adoption, and appointment of guardians to the second Respondent during his minority, purported to bequeath one-fourth of his estate to the Appellant, his widow. The fact of the adoption and execution of the Will were both denied by the Appellant. Witnesses were examined on both sides, whose evidence as to the adoption and execution of the Will was so unsatisfactory, that the Judge of the Civil Court of *Cuddalore* called an independent witness, not named by either party, and upon whose individual testimony, in addition to an *arzee* sent to the Collector of the District informing him of the adoption, and alleged to have been signed by the Appellant, who lived in seclusion, the day after her husband's death, the Courts in *India* pronounced both the adoption and Will valid. Hence the present appeal.

The general facts of the case, and the effect and weight of the evidence, is stated in their Lordships' judgment.

The appeal was heard *ex parte*.

Sir *Hugh Cairns*, Q.C., and Mr. *Pontifex*, for the Appellants.

22nd Dec. 1865.

The consideration of their Lordships' judgment was adjourned, and now pronounced by

The Right Hon. Lord CHELMSFORD.

After stating the nature of the appeal, his Lordship proceeded as follows:—

The claim to the property is founded on an alleged

adoption of the infant, *Virasami Naiker*, by *Balakristnama Naiker* on the day of his death, on which day it is alleged, that he also executed a Will, by which he appointed the Respondent, *Sashachalla Naiker*, the uncle of the infant, and *Devanayaga Naiker*, the father of his wife (the Appellant), the guardians of his adopted son, and "to manage all the affairs," till his adopted son came of age.

The alleged adoption took place at 7 o'clock, and the Will was made about 9 o'clock, in the evening of the 30th of *July*, 1849. Although there was no necessary connection between these two acts, as the adoption might be good and the Will invalid, yet it is difficult to separate the different transactions of the day from each other, or to view them in any other light than as different parts of one arrangement.

On the part of the Appellant both the adoption and the Will are disputed, the first by denying that it ever took place, and both upon the ground that *Balakristnama Naiker* was on the day in question utterly incompetent to perform either of the acts imputed to him.

The acts which are said to have constituted the adoption are described by all the witnesses in almost the same words (no unusual circumstance with Indian witnesses), but there is no reason to suspect that these acts were not performed; and the mere *factum* of the Will appears to be sufficiently established by the evidence.

There was no proof that application had been previously made to the natural parents of *Virasami* to give their child in adoption, nor was it shown that *Balakristnama Naiker* had ever contemplated the adoption of this boy before the day in question.

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The acts were performed without much preparation, and without many of the accustomed ceremonies, but it was admitted in argument that they were not essential, and that enough was done (if there were no other objection but the absence of these ceremonies) to constitute a legal adoption.

The case was heard *ex parte* before their Lordships, but in the Civil Court in *India* it was strongly pressed against the Appellant in support of the validity of the adoption, that she was a consenting party to it, performing her part in the ceremony, and afterwards showing by unequivocal acts her entire acquiescence in what had been done. These acts were—allowing the boy to perform the funeral rites as an adopted son, and the day after the adoption putting her mark to an *arzee* addressed to the Collector of *Southern Arcot*, stating the adoption and the performance of the funeral rites by the adopted son, and praying for the transfer into his name of her late husband's property.

With respect to the *arzee*, the Appellant, who was examined as a witness in the suit, positively denied that she ever put her mark to it, and asserted that it was a fraudulent imposition upon her; and, as to the performance of the funeral rites, it was alleged on her behalf that they were not performed by *Virasami* as an adopted son, but as her agent, she being unable by the custom of her caste to go out and perform them herself.

The evidence in support of the *arzee* is not of the most satisfactory description. *Devanayaga*, the Appellant's father, by whom it is said to have been prepared, and who wrote her name before she put her mark to it, was not produced, although he was in the

list of witnesses delivered in by the Plaintiff. The reason for not examining him is stated in a memorandum presented to the Court by the Plaintiff, "that he suspected *Devanayaga Ayangar* was associating with the adverse parties."

With respect to the performance of the funeral rites considerable doubt at least arises upon the testimony of the *Purohit*, or family Priest, whether they were really performed by the boy as an adopted son.

But assuming both these acts to be satisfactorily established, and also the participation of the Appellant in the proceedings of the 30th of *July*, 1849, all this will not sustain the validity of the adoption, unless it clearly appears that the act itself was performed under such circumstances as would render it perfectly legal.

The concurrence of the widow, and the various acts of acquiescence attributed to her, would be important if they were brought to bear upon a question which depended upon the preponderance of evidence; but if the facts are once ascertained, presumptions arising from conduct cannot establish a right which the facts themselves disprove. The Appellant is a Hindoo female. So long as she is acting without the guidance of a disinterested adviser her acquiescence in an alleged adoption or Will ought not to prejudice her. In such a case as the present it was hardly to be expected that she would be capable of distinguishing between an adoption in fact, and a legal adoption, or between a Will in fact, and a valid Will. The acts attributed to her are really no confirmation of the Respondents' case, as every one of them upon

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which reliance is placed might equally have been done with respect to a legal or an avoidable adoption.

The question, therefore, will be, not whether certain acts were done which if unobjectionable in other respects would have constituted adoption, but whether the alleged adopting father was of sufficient capacity at the time to understand the nature and object of those acts, and voluntarily gave an intelligent consent to their performance.

On this question, upon which the validity of the adoption and of the Will depends, many witnesses were called on both sides. It is unnecessary to examine the evidence, or to weigh one set of witnesses against the other, because the Judge who tried the cause in the Court below declined to decide the case upon their conflicting testimony, but himself directed an additional witness to be examined, and taking the facts deposed to by him as to the bodily and mental state of *Balakristnama Naiker* at the time of performing the acts in question, made them the foundation of his judgment. Can it be said that he rightly exercised his judicial function in the appreciation of those facts, and in the correct application of the law to them? What is the description given by *Kandoji Rao*, the Court witness, as he is called, of the state of *Balakristnama Naiker* on the day in question? That of a dying man, almost continually insensible, though occasionally roused to consciousness by loud tones, or by pungent applications to his nostrils, but almost immediately afterwards relapsing into a state of insensibility, and when momentarily conscious, with his mind quite inert and instantly fatigued upon the slightest exertion.

How is it possible that a person in such a condition

could be capable of any act requiring judgment and reflection, especially one to which no antecedent circumstances appear to have led, and for which the enfeebled and scarcely conscious mind was unprepared. In such a state as that described, even if the mind were passively awake to the suggestions made to it, it would naturally cling to repose, and yield, for the sake of it, to any external suggestion. Viewing the adoption and the Will together, they present every appearance of a concerted family arrangement. As an adopted child passes into a new family, his natural relations become, as it were, strangers, and the association of the boy's natural uncle with the father of the adopting mother for which the Will provides, must be regarded as a contemporaneous and concurrent act with the adoption. If the law were to countenance acts of this description, performed at such a time and under such circumstances, without the clearest and most cogent evidence to establish their validity, relations and managers would be encouraged to advance their own private notions of what might be advisable to be done for the good of the family, and to ascribe acts to a dying man in which he would have been the merely passive instrument to prolong their own gain and authority.

If this question had come originally before their Lordships, and not by way of appeal, they would have had no difficulty in deciding that *Balakristnama Naiker* was on the day in question quite incompetent to perform the adoption, or any other act requiring the exercise of the powers of judgment and reflection.

They have, however, to deal with the case under the influence of two previous decisions at variance with their own views. But the concurrence of opinion of

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two Courts in *India*, even upon a mere question of fact, has not upon previous occasions prevented their Lordships acting upon their own independent judgment. In the case of *Rungama* v. *Atchama* (4 Moore's Ind. App. Cases, p. 1), upon a disputed question of adoption, the Provincial Court and the *Sudder* Court on appeal, held that the evidence was not sufficient to establish the fact of adoption: but their decision was reversed by this Committee. Precisely the same state of things occurred in *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (4 Moore's Ind. App. Cases, 414), and with the same result. And in *Mudhoo Soodun Sundial* v. *Suroop Chunder Sirkar Chowdry* (4 Moore's Ind. App. Cases, 431), Dr. *Lushington* in delivering the judgment of their Lordships, says in p. 433, "Both the Courts below have decided against the validity of the instrument; a fact which, considering the advantages the Judges in *India* generally possess, of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favour of the correctness of their decisions, but does not, and ought not to relieve this, the Court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case."

This case is something different from a mere question of fact. The matters questioned, an adoption and a Will, involve both the *factum* of each and the capacity of the alleged adopting father and Testator. Each of these acts interferes with and displaces previously existing rights, inchoate or presumptive. A Judge who decides in favour of a disputed adoption or Will in a case of questioned capacity of a dying

man, must apply his mind not simply to the act of adoption in fact, or to the execution in fact of a Will, but he must be careful to see that the jealous requisitions of the law as to the proof of acts of persons done *in extremis* are fully complied with. Now, in this case the Judge, not satisfied with the evidence brought before him, selected a witness to assist him with his judgment. There was no careful weighing of the evidence on both sides, but his decision was founded upon the single testimony of this witness. The *Sudder* Court say, "Little need be added to the arguments on which the Civil Judge has founded his decision," and they add nothing. They, therefore, adopt the conclusions at which the Civil Judge arrived, based not upon a review of the whole of the evidence, but upon a witness chosen by himself, whose testimony in the opinion of their Lordships does not warrant the judgment which he has pronounced. They will, therefore, recommend to Her Majesty that the decrees appealed from be reversed, with costs.

MAHARAJAH RAJUNDUR KISHWUR SING, BAHADOOR - - - } *Appellant,*

AND

SHEOPURSUN MISSER - - - *Respondent.**

On appeal from the Sudder Dewanny Adawlut of Bengal.

7th & 8th Feb. 1866.

A summary suit was brought by *A.* against *B.*, to recover arrears of rent of certain *Mouzahs* alleged to be held by *B.* under a Lease and *Kabooleat.* The defence by *B.* to the suit was a denial that the latter instrument had been executed by him, and he set up a title to the *Mouzahs* as being *Bhakee Birt* tenure. The Deputy Collector before whom the suit was tried, doubted the execution of the *Kabooleat* by *B.*, and dismissed the suit. *A.* then brought a regular suit against *B.*, seeking, first, to establish his proprietary title to the *Mouzahs* as *Zemindar;* secondly, to set aside the summary award; and thirdly, to recover arrears of rent under the lease and *Kabooleat,* when *B.* raised the same defence as in the summary suit. The *Sudder* Court nonsuited *A.*, and dismissed the suit for multifariousness and misjoinder. Such decree reversed on appeal by the Judicial Committee as, by the rules of pleading in *India,* a claim for rent in arrear, and to remove doubts in *A.*'s title as *Zemindar* to lease to *B.*, as raised by the defence, is not objectionable on the ground of multifariousness, but can be included in one plaint.

THE Appellant in this case by his suit claimed, first, possession of certain *Mouzahs,* as forming part of his *Zemindary;* secondly, to set aside a summary award which upheld the Respondent's right under an alleged *Bhakee Birt* tenure; and thirdly, to recover arrears of rent under a lease and *Kabooleat,* alleged by him to have been granted to the Respondent of the *Mouzahs* in question. The *Sudder* Court, in effect, reversing the decree of the *Zillah* Court, declined to adjudicate the case upon the issues raised as to the title

* Present:—Members of the *Judicial Committee*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

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of the Appellant as *Zemindar* to the *Mouzahs*, on the ground of the multifariousness and misjoinder of claims in the plaint. Hence the present appeal.

As the judgment upon appeal was confined to a question of pleading, it is only necessary to give a brief outline of the facts.

It appeared from the statements in the Appellant's case, that the entirety of *Pergunnahs, Majhona* and *Sumraon*, comprising the *Zemindary* of the Appellant, were permanently settled by the *Government*, under *Ben.* Reg. I., of 1793, in the years 1790–1, without specification of *Mouzahs*, and only by *Tuppahs*, with the grandfather of the Appellant, *Maharajah Beer Kishwur Singh.* That the *Mouzahs* in question, ten in number, were included within two of the settled *Tuppahs*, viz., *Tuppah, Chigwun Butsurra* and *Tuppah, Manpore*, situate in *Pergunnah Majhona.* The *Maharajah* died in possession of the entirety of the *Zemindary*, which ultimately descended to the Appellant.

It further appeared, that since the permanent settlement in 1790–1, the *Mouzahs* in question, had been let to different tenants, at varying *jummas*, sometimes jointly with other lands, and sometimes separately. That from the year 1223 [*Fusly*, 1815-1816 C. E.] to 1819 C.E., the *Mouzahs* were let to *Nanouh Ram Misser*, the father of the Respondent, afterwards to other persons, and further, that in the year 1850, the Appellant's ancestor, *Maharajah Nawul Kishwur Singh*, had granted to the Respondent a lease of the *Mouzahs* for five years, at a *jumma* of Rs. 2,305. 13a. 6p., delivering to him a *Pottah*, and taking from him a *Kabooleat*, or counterpart, of such lease.

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The rent secured by the lease and *Kabooleat* falling into arrear, the late *Maharajah* in 1853 instituted a summary suit against the Respondent in the Deputy Collector's Court of *Chumparun*, to recover the arrears due. The Respondent by his answer denied that he was lessee of the *Mouzahs*, or had taken any lease; or executed a *Kabooleat*, and set up a title to the *Mouzahs* as having for a long time been ancestral, and purchased as *Bhakee Birt* by his ancestors; that his ancestors and himself had been in possession of the *Mouzahs*, paying the revenue, according to the rent-roll fixed in *Fusly*, 1197, yearly, to the *Maharajah*, in consequence of its being joint at the settlement of the lands in 1198, *Fusly* (1790-1), and that the *Maharajah* had no right to diminish or enhance the registered *jumma*. This was denied by the *Maharajah*, but the Deputy Collector being of opinion, that the execution of the *Kabooleat* was doubtful, dismissed the summary suit.

In consequence the *Maharajah* brought a regular suit in the Court of the Principal *Sudder Ameen*, for the District of *Sarum*, against the Respondent.

In the plaint the claim was laid at Rs. 68,036. 7a., the value of the lands in dispute and balance of rent due for the years 1260 and 1261 *Fusly* (1852-3; 1853-4 C.E.). The plaint stated, that the Plaintiff sued for possession of the *Mouzahs*, his hereditary property, amounting in extent to 2,587 *beggahs* of land, and valued at Rs. 64,700, the price of the land at issue, at the rate of Co.'s Rs. 25 *per biggah*, and to recover Rs. 1,030. 9½a. arrears of rent for 1260 *Fusly*, for which a summary suit was pending, and Rs. 2,305. 13a. 2p., the rent for 1261 *Fusly*, inserted

in the *Kabooleat*, dated 5th of the month of *Assin*, 1258 *Fusly*, making an aggregate claim of Co.'s Rs. 68,036. 7a.; by the annulment of a summary award of the Deputy Collector of the District of *Chumparun*, dated the 29th of the month of *May*, 1854, and by the cancellation of a letter affirming the *Bhakee Birt*, dated the 17th of the month of *Assar*, 1232 *Fusly*, and alleged by the Defendant to have been granted by *Maharajah Anund Kishwur Singh* to *Nanouh Ram Misser*, the father of the Defendant. The principal facts above stated were set forth in the plaint, and, amongst others, that the *Mouzahs* in question were a part of the Plaintiff's settled ancestral *Zemindary*, and had been let on lease or farm to divers persons, and, among others, to the Respondent, and previously to his father, since deceased. The plaint also stated that litigation had occurred in 1228 *Fusly* (1820-1 C.E.), between the late *Maharajah Anund Kishwur Singh* and the father of the Respondent, and pleaded and insisted on the disclaimer made therein, on the 18th of *September*, 1824, and which then became and thereafter remained matter of record, of the *Bhakee Birt* tenure and title set up by the father of the Respondent, and also on the judgment of the Magistrate, dated the 16th of *February*, 1825, founded on that disclaimer; and the plaint charged and insisted that a letter and four acquittances said to bear the seal of the late *Maharajah*, and relied upon in the summary suit by the Respondent, in order to avoid the effect of such disclaimer, were forgeries; and in corroboration the plaint referred to the previous legal proceedings brought against the Respondent for rent, and by him

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against the *Ryots*, in which he was described as "farmer" merely, and also to the fact that no mention was made therein respectively, or otherwise at all, of the pretended *Bhakee Birt* tenure, letter, or acquittances aforesaid respectively, since the disclaimer, and the judgment of the Magistrate. The plaint, after pointing out that the finding of the Deputy Collector, on the comparison of seals merely, in favour of the authenticity of the alleged letter and acquittances, was erroneous, and not founded on any sufficient proof, concluded by insisting that the proprietary right and possession of the *Maharajah* and of his ancestors with respect to the *Mouzahs* in question, and the absence of any interest of the Defendant in them, were manifest; nevertheless, owing to the Deputy Collector having passed an Order for the dismissal of the claim for rent, it had become necessary to prefer a claim for possession by the annulment of the award, and to recover the rent, and prayed that the summary award, and the letter of *Bhakee Birt* pleaded by the Defendant, might be annulled, and that possession of the *Mouzahs*, and the claim for rent, with interest hereafter, and *Putnee* mesne proceeds, with interest to the day of possession, be granted from the Defendant.

The Respondent by his answer, after taking several technical objections to the suit and to form of the plaint, stated that the *Mouzahs* came into possession of his father at different periods, as *Bhakee Birt* at a *jumma*, or rent of Rs. 1,901, the revenue fixed, as it was alleged, at the settlement of 1197 *Fusly*. The answer then admitted the legal proceedings had taken place in 1228 *Fusly*, between *Maharajah Anund Kishwur*

Singh and the Respondent's father, and the filing of the disclaimer by the father, which he accounted for as being given under coercion and pressure. The answer denied the execution of the *Kabooleat* by the Respondent, and then referred to and relied on the award or decree in the summary suit brought on that instrument for rent.

Issues were recorded by the Principal *Sudder Ameen*, the principal being, first, whether there was a misjoinder of claims, and secondly, as to the alleged tenure of *Bhakee Birt*.

Both parties went into evidence to establish their respective claims, and the hearing of the suit took place on the 3rd of *May*, 1856, before the Principal *Sudder Ameen* (*Mirza Mahomed Saduk Khan*) of the District of *Sarun*, when a decree was made in favour of the Plaintiff. In that judgment all the technical objections pleaded in bar were set aside, and it was therein stated, that the suit had originated agreeably to the reasons stated in the plaint, on account of the plea of *Bhakee Birt* having been set up on the part of the Defendant in the summary suit; that in fact, the *Kabooleat* and summary suit were for nine *Mouzahs*, but, inasmuch as the plea of *Bhakee Birt* referred to eleven *Mouzahs*, and one out of these was not under litigation, for this reason, the claim was for ten *Mouzahs*. That these facts were all manifest from the plaint and replication, and that there was no flaw in this case; and passing over some other technical points, it was declared, that there was no misjoinder of claims, because the principal claim was for possession by the annulment of the *Bhakee Birt*, and the claim for rent had been connected with it like mesne

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proceeds; that, till 1261, which was within the term of the lease pleaded by the Plaintiff, the claim was under the designation of rent, and subsequent to that the application was for mesne proceeds till the recovery of possession; and that, therefore, there was no joinder of contradictory claims. The decree then decided against the *Kabooleat* of the Defendant, filed by the Plaintiff, stating that it was not proved to the satisfaction of the Court; and that its genuineness could not be relied upon, because it had been executed upon plain paper, and attested by two of the subordinates of the Plaintiff; that when the *jumma* contained in a *Kabooleat* was high, that is, above Rs. 2,000, and there has been a contention with the Defendant on a former occasion, its execution in this manner was surprising, and that in such a case it was necessary that the *Kabooleat* should have been executed upon stamp paper and registered, and ordered that the case be decreed with a modification, that the Plaintiff be put in possession of the *Mouzahs* in question and recover from the Defendant the mesne proceeds thereof, from that day's date till recovery of possession, whatever might be ascertained at the execution of the decree, with costs proportionate to the amount proved, and interest according to practice; that the costs of the Plaintiff for the amount unproved be charged to the Plaintiff, and that the costs of the Defendant be borne by himself.

The Defendant appealed against this decree to the late *Sudder Dewanny Adawlut* of *Bengal*. The principal ground of appeal was, that by reason of the claim being multifarious, the Plaintiff ought to have been nonsuited. A cross appeal was also brought by

the Appellant against so much of the last-mentioned decree as declared that the *Kabooleat* was not proved to have been executed.

The hearing of both appeals came on before the late *Sudder Dewanny Adawlut*, the Court consisting of Messrs. *B. J. Colvin*, *A. Sconce*, and *D. J. Money*, on the 31st of *July*, 1858, when a decree was pronounced, reversing the decree of the Principal *Sudder Ameen*, and dismissing, or nonsuiting, the Plaintiff's suit. The judgment of the *Sudder* Court stated, that the Plaintiff's Pleaders contended, that the *Kabooleat* said to have been executed by the Defendant on the 5th *Assin*, 1858, was a reciprocal contract, binding by its terms on both parties; that this contract being repudiated by the one party, could not be binding on the other; that the Defendant, rejecting the *Kabooleat*, relied upon an earlier title, and that this earlier title being opposed to the Plaintiff's right as *Zemindar*, he was competent to sue to set it aside; that the averment that the Defendant was a farmer for five years, created by the will of the *Zemindar*, was a simple and limited issue; but if that issue was not substantiated, it appeared to the Court that it would be unjust to the Defendant to put him to the disadvantage of opposing his ejection from the villages upon grounds incompatible with the ground which Plaintiff chose as his cause of action. And, lastly, the Court considered the *Kabooleat* of 5th *Assin*, 1258, not to be substantiated; and that it would be improper to proceed to adjudicate upon issues which could arise only from circumstances foreign to the claim founded upon that document. The decree accordingly dismissed the Plaintiff's suit, so far as it concerned the validity of the *Kabooleat*; but did not adjudicate any issue as to the Defendant's

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right of occupancy of the villages, or to his alleged *Bhakee Birt* tenure, declaring that on those points the decision would have the effect of a nonsuit.

The present appeal was from this decree.

No appearance having been put in by the Respondent, the appeal was heard *ex parte*.

The Attorney-General (Sir *R. Palmer*, Q.C.), and Mr. *Leith*, for the Appellant.

This decree is most unsatisfactory. The Court below refused to decide upon the merits, upon a technical ground of pleading, which we submit cannot be sustained. There was, we submit, no such misjoinder of claims as justified the Court in nonsuiting the Appellant. The Court, having regard to the pleadings and circumstances of the case, ought not to have refused to adjudicate the issues raised as to the Respondent's right of occupancy of the *Mouzahs* in question, under the alleged *Bhakee Birt* tenure set up by him, and as to the effect of the summary decision of the Deputy Collector establishing the same. [Sir *Lawrence Peel*: The *Sudder* Court seems to forget the rights of the Plaintiff, and to treat the defences of the Defendant as the cause of the Plaintiff's action.] The primary object of the suit was to obtain a reversal of that summary award, and to have it decreed and declared that such *Bhakee Birt* tenure did not exist, and then on the assumption that such a tenure did not exist, as ancillary thereto, and on his right as *Zemindar* and proprietor of the *Mouzahs*, to obtain in the alternative, either a decree for the rent due during the time the Respondent was in possession under the lease and *Kabooleat*, or a decree for possession, in the event of his denial of such a lease.

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Upon the merits we contend that from the frame of the answer, the *onus probandi* was on the Respondent to prove the *Bhakee Birt* tenure, relied upon by him, which he failed to do; while, on the contrary, the Appellant established his preliminary title, and that the *Mouzahs* were held by the Respondent's father, himself and others, as ordinary lessees, at varying rents, and not under any fixed tenure, as he set up in his defence.

10th Feb. 1866.

Judgment having been reserved, was now delivered by

The Right Hon. Lord CHELMSFORD.

This is an appeal from a decision of the late *Sudder Dewanny Adawlut* of *Bengal*, which reversed a decision of the Zillah Court in favour of the Appellant, the Plaintiff in the suit. The decision of the *Sudder* Court proceeded solely on the ground of misjoinder of causes of action in the Plaintiff's suit. That objection had been raised in, and overruled by, the Court below. It is necessary for the due consideration of this objection to ascertain carefully what are the causes of action which are stated in the plaint. The plaint states them with sufficient precision in the first paragraph. It alleges that the Plaintiff sues, not summarily, but in due form, for possession of certain *Mouzahs* which it describes by names and boundaries, and which it alleges to be his hereditary property; and also to recover certain arrears of rent, amounting to Rs. 1,030. 9½ for 1260, *Fusly*, for which a summary suit was pending; and Rs. 2,305. 13a. 2p., the rent for 1261, *Fusly*, inserted in the *Kabooleat*, dated the 5th of the month of *Assin*, 1258, *Fusly*, by the annulment of a summary award of the Deputy

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Collector of the District of *Chumparun*, dated the 29th of *May*, 1854, and by the cancellation of a letter affirming the *Bhakee Birt* tenure, dated the 17th of the month *Assin*, 1232. This specification of the causes of suit is accompanied with statements of the falseness of the claim to the *Bhakee Birt* tenure, of the danger which the Plaintiff apprehends to his proprietary title from the summary decision above mentioned, that its annulment is impossible without a regular suit, and he concludes the paragraph by stating that he sues, therefore, for the reversal of the summary award, the confirmation of his proprietary interest and possession, and the refutation of the allegations of the Defendant respecting the *Bhakee Birt* tenure.

The case, then, as alleged in the plaint, if the plaint be regular, must be brought within the principles stated in Mr. *Macpherson's* Book on "Civil Procedure," page 111 [3rd. Ed.], where he says, "A plaint may have an appearance of doubleness when it prays, not only for possession, but that the transactions upon which the Defendants are supposed to found their title may be set aside; but the latter prayer is merely subsidiary to, and, in fact, forms part of, the former, because possession cannot be given without first removing the existing impediments." This question is distinct from any that relates merely to defect of proof or error in law, in a Plaintiff's view of his case in the whole or part, that may warrant a dismissal at the hearing wholly or in part. The question here relates to unity of title, and connection and dependence between the claims of the Plaintiff. In this suit the Plaintiff's title is one; it is his proprietary right as *Zemindar*. We must look to the Plaintiff's admitted title as *Zemindar* and to the in-

terference with such title by an established tenure of this kind, to learn what is meant by the term "possession." The *Mouzahs* are part of the Plaintiff's *Zemindary;* the Plaintiff is the assessed proprietor under the Decennial Settlement. The Defendant claims that which would, if established, be a dependent tenure, the *Zemindar* being his immediate superior in the holding. It is not a *Ryotwary* tenure at all, and no question as to *Ryot's* title to occupancy can arise in this dispute. All the distinct portions of the Plaintiff's claim flow from, support, and have relation to and connection with his proprietary title, which *primâ facie* entitles him to the collections. The farming lease supports it, the rent payable under that lease supports it, and the removal of the adverse title would confirm it.

If this tenure be not interposed between the *Zemindar* and the cultivators, the ordinary relation between him and them exists; but if it be interposed, the *Zemindar's* general proprietary title to the collections is gone, and in lieu of it he is simply entitled to some *jumma* from the mesne proprietors. It is obvious, then, that the assertion of such a title is a serious prejudice to a *Zemindar*, and may materially interfere with his successful management of his *Zemindary*. Such an intermediate tenure cuts off the possession, that is, the *Zemindar's* title to the rents and profits immediately derived from the cultivators.

In this sense, the term "possession" is used in this plaint. Now, this injury, supposing the claim to the *Bhakee Birt* tenure to be groundless, is not the less a wrong requiring a remedy, when it is put forward by one in possession under a title to an inferior right, derived from the *Zemindar;* as, for instance, by a farmer

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of a portion of the *Zemindary*. If such a claim were preferred by a person having such an interest, it would certainly be competent to the *Zemindar*, if the claim amounted to a repudiation or worked a forfeiture of the existing interest, to sue for the restoration of possession, and the quieting of the claim also; because the limitation of his demand to that of possession would keep alive an adverse claim, and would also multiply suits.

A *Zemindar*, or landlord, may waive a forfeiture, and may treat a tenancy or interest as continuing which his tenant repudiates, or in respect of which he has incurred a forfeiture. Consequently, the mere inclusion of a claim for rent in a suit of this character cannot make the suit multifarious, unless it could be treated as multifarious if it insisted on the repudiation or forfeiture.

If the *Bhakee Birt* tenure be valid, the Plaintiff has no title to possession in the sense in which he uses that term. He might have a right to rent for a time on the footing of contract, or estoppel even from a *Birt* tenant, if the latter accepted a lease, but that would rest on special grounds, and would not flow from his general proprietary title. Until this claim to a *Birt* tenure, therefore, be removed, the Plaintiff cannot have the "possession" which he seeks, since, in some way or other, the Defendant stands between the Plaintiff, as owner of the *primâ facie* proprietary right and the cultivators. Had the Defendant admitted the tenancy under the *Kabooleat*, the Plaintiff's title to the rent would have been established, but that admission, unless qualified, would also have removed those impediments to the Plaintiff's proprietary title which he desires to have removed; but

as the Defendant repudiates that tenancy altogether, he, at least when the Plaintiff fails to prove it, cannot urge it against the Plaintiff's title. See in the case of *Raja Oodit Purkash Singh* v. *Martindell* (4 Moore's Ind. App. Cases, p. 451), Lord *Kingsdown's* judgment in affirmance of the general principle.

This lease being removed (the Plaintiff having failed to prove it, and the Defendant renouncing it), what bar is there to the assertion of the proprietary right to the collections, unless the *Birt* tenure interpose one? On that bar the Defendant does rely, and unless it be removed, the Plaintiff can scarcely expect to lease or otherwise manage his *Zemindary* with effect. It is an impediment in the way of his possession, which the suit is instituted to remove. The reasons alleged in the *Sudder Ameen's* Court for overruling the objection seem to be unsatisfactory; for as the title to mesne profits supposes a wrong, and the title to rent proceeds on contract, the union of such causes of action would be contrary to principle. But as these Courts have the divided jurisdiction of a Court of Law and a Court of Equity substantially united in one Court, a claim for rent in arrear, and a claim to remove clouds on the title to demise raised by the tenant, seem to be unobjectionable, and no authority was cited to support the objection. In truth the claim to rent under the farming lease supports the proprietary title.

No inconvenience can result from the inclusion of these subjects in one suit, since the defence to the claim for rent in fact raised them all, and they were dealt with without confusion or difficulty.

Their Lordships think, therefore, that the Sudder Court should have heard the appeal upon the merits.

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Their Lordships ought, upon general principles, to give now the decision which the *Sudder* Court should have given; but a difficulty has been interposed in the Court of the *Sudder Ameen*, which renders a decision on the *Birt* tenure impossible by this Board. The question of this *Birt* tenure has not been adjudicated upon in the Court below. The *Sudder Ameen* should have allowed the Defendant to get his documents stamped, and, if necessary, should have adjourned the hearing for that purpose. The Court, however, excluded them from evidence, as unstamped, and as documents which were inadmissible unless stamped. The Plaintiff ought not in any way to be prejudiced by this neglect of the Defendant, and to allow the Defendant to reagitate these questions as to the *Birt* tenure in another suit would be a serious injustice and wrong to the Plaintiff. The proper course, then, to be adopted is to reverse the decisions of the *Sudder* Court and of the *Sudder Ameen*, and to remand the cause to the lower Court, not for the purpose of taking further evidence, or of hearing the cause on fresh materials other than the stamped documents, but to enable the Defendant to get the instruments stamped. The inferior Court should then decide on the evidence already taken in the cause, and on those documents, if stamped, with reference to all the issues raised on the cause, giving a complete decision on them all. Their Lordships will forbear from expressing any opinion upon the validity of the *Birt* tenure, on the evidence in its present imperfect state; but they think it proper to observe that if the *Birt* tenure be displaced, that displacement will tend considerably to fortify the Plaintiff's proof of the *Kabooleat;* for the Defendant's possession

would then have no apparent title, unless one derived from a lease from the *Zemindar*, the sole proprietor; no person (on that hypothesis) intervening between the cultivators and the proprietary title of *Zemindar*.

This Order for remanding the cause to be thus re-heard, will entitle the Plaintiff to have the matter of his appeal to the *Sudder* on the *Kabooleat* reopened. It is in favour of his appeal so far as to subject the decision against the *Kabooleat* to review upon the reconsideration of the whole case upon the merits. The consideration of a case upon evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered, or on proofs withheld, on the course of pleading, and tardy production of important portions of a claim, or defence, be viewed in connection with the oral or documentary proof which *per se* might suffice to establish it. This caution is more particularly necessary in *India*, where fabrication of seals and documents is so common and so skilfully conducted.

Their Lordships will recommend to Her Majesty that the decrees of the *Sudder* Court, and of the *Sudder Ameen* be reversed; that the Appellant should have the costs of the appeal; that the cause be remanded to the High Court, with directions to send the cause back to the *Zillah* Court for re-trial, on the issue of the existence of the *Birt* tenure, giving the Respondent an opportunity of having the unstamped documents stamped, if he shall be so advised, but making him liable for the costs of the first trial, which his omission to have those documents stamped has made abortive.

LALLA BUNSEEDHUR - - - *Appellant,*

AND

KOONWUR BINDESEREE DUTT SINGH, and after his death, MUSSUMAT GUNAISH KOER - - - } *Respondent.**

On appeal from the Sudder Dewanny Adawlut of the North West Provinces at Agra.

5th & 7th Feb. 1866.

THE suit out of which the present appeal arose was instituted by the late *Koonwur Bindeseree Dutt Singh* deceased, and afterwards represented by the Respon-

In 1850, the guardian of a Minor (his stepmother) by an *Ikrarnamah*, among other things, charged the Minor's ancestral estate with the payment of Rs. 27,000 in favour of *L.*, the amount of his alleged claim against the estate, respecting which an appeal was then pending, but to which estate he was himself a debtor, undertaking at the same time to prosecute certain claims against *M.*, *L.* agreeing to advance money for that purpose, and to resist certain claims brought by *M.* against the Minor's estate. In *February*, 1851, *M.* having obtained judgment against the estate for Rs. 26,986, and taken out execution thereon, the estate was advertised for sale on the 20th of that month. To prevent the sale, *L.* advanced the amount of the judgment debt, and on the 19th of that month commenced a suit against the guardian in which he claimed the Rs. 26,986, the amount advanced by him, and the Rs. 27,000 agreed to be paid him by the *Ikrarnamah*, and the further sum of Rs. 1,354, alleged to have been paid by him for the proceedings against *M.*, making together Rs. 55,341. On the following day the guardian filed a confession of judgment admitting the debt, hypothecating the Minor's estate, and undertaking to pay the same by instalments, with the exception of the Rs. 27,000, at six *per cent.* interest. The instalments not being paid, *L.*, in 1853, took out execution on the judgment, and under the execution put up the estate for sale, and became the purchaser himself. On the Minor attaining his majority, he brought a suit to set aside the sale, impeaching the transaction as fraudulent and collusively obtained by *L.* from his late guardian. The Courts in *India* set aside the sale upon the ground of

* Present:—Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

dent, against the Appellant and *Goolab Koonwur*, his step-mother, who had acted as his guardian during some part of his minority. The object of the suit was to recover a *Talook*, and other ancestral property, purchased by the Appellant at a judicial sale under a decree, which it was alleged had been fraudulently procured by him through collusion with *Goolab Koonwur*, in a suit brought by him in which she had allowed judgment to go by default; the suit having been originally instituted under an *Ikrarnamah*, or deed of agreement, executed by her as guardian to the Respondent, charging the Minor's estate.

The adverse title set up by the Appellant was thus derived. *Sheodutt Singh*, the Respondent's father, died on the 3rd of *July*, 1849. He had had, in his lifetime, pecuniary dealings with one *Seetaram Singh*, the Appellant's father, and these had involved him in a long course of litigation with the Appellant. For advances to carry on that litigation, or otherwise, he had become largely indebted to one *Mohun Lall*. At

fraud, and decreed the restitution of the estate, with mesne profits and damages, subject to the repayment, by way of reduction, of the Rs. 26,986 at five *per cent.* Upon appeal, such decree affirmed by the Judicial Committee, first, on the ground that the transaction was fraudulent and collusive, and prejudicial to the estate of the Minor; there being no evidence to show the necessity for the guardian obtaining the pecuniary assistance sought, or to justify her submitting to *L.'s* extraordinary terms contained in the *Ikrarnamah*, by allowing, without consideration, his doubtful claim against the Minor's estate, to which he really was a debtor himself; and secondly, that *L.*, who set up the charge, had failed to relieve himself of the burden which the Hindoo law cast upon him of showing that he had, at least, good ground for supposing that the transaction was for the benefit of the Minor's estate.

In setting aside the *Ikrarnamah* and sale, interest was allowed *L.* on the Rs. 26,000, advanced by him, at the rate of six *per cent.* contracted for in that instrument, in lieu of five *per cent.* awarded by the *Sudder* Court.

Such a modification of the decree of the Court below, held not sufficient to deprive the Respondent of costs of appeal.

The case of *Ali Hossein* v. *Badel Khan* (19th of *May*, 1863, *S. D. A., N. W. P.*), where it was held, that there is no difference to be made between the innocent purchaser and one tainted with fraud, which had brought about an execution sale observed upon and dissented from.

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the time of his death his son (the Respondent) was but four years old; and his step-mother, *Goolab Koonwur*, became his guardian.

In *February*, 1850, a negotiation took place between her and the Appellant, which resulted in her executing to him on the 17th of that month, an *Ikrarnamah*, or deed of agreement. By that instrument she, amongst other things, charged the Minor's estate with the payment of a sum of Rs. 27,000 to the Appellant, and undertook to prosecute certain claims against *Mohun Lall*; the Appellant undertaking to advance money on certain terms for that purpose, as also for the purpose of resisting the claims which *Mohun Lall* was prosecuting against the Minor's estate.

In *February*, 1851, *Mohun Lall* having obtained judgment against the estate for Rs. 26,986. 15a. 4p., and taken out execution thereon, had advertised the estate for sale, on the 20th of that month. It was alleged that to prevent this sale, the Appellant advanced the amount of the judgment debt; and, on the 19th of *February*, commenced a suit against *Goolab Koonwur*, as the guardian of the Respondent, in which he claimed, as due to him from the estate, the amount of that advance, the sum of Rs. 27,000, which was stipulated by the *Ikrar* to be paid to him; and a further sum of Rs. 1,354. 1a. 9p., alleged to have been advanced for the purposes of the proceedings against *Mohun Lall*, making, in all, the sum of Rs. 55,341. 1a. 1p. On the following day the guardian, as Defendant, filed a confession of judgment, admitting the whole amount claimed to be due; undertaking to pay it by annual instalments of Rs. 7,000; reciting the *Ikrar* and the advance of the Rs. 26,986. 15a. 9p.; hypothecating the Minor's estate

as a security for the whole amount admitted to be due; and providing that in the event of any failure in the payment of the annual instalments, the Appellant should be at liberty to take out execution against the hypothecated property for the whole amount of his judgment debt with interest. It was stipulated, however, that the Rs. 27,000 should bear no interest, and that the rate of interest on the rest of the debt should be six per cent.

The instalments were not paid; and, in 1853, the Appellant took out execution on the judgment confessed for the sum of Rs. 70,168. 7a. 11p., put up the property for sale under that execution, and on the 20th of *June*, 1853, purchased it himself for Rs. 51,635. In consequence, however, of a mortgage on the *Talook*, which was held by *Mohun Lall*, which gave rise to a protracted litigation, he did not obtain possession of that portion of the property purchased until the year 1860.

The Respondent attained his majority in *December*, 1860, and commenced this suit on the 22nd of *July*, 1861. By his plaint he impeached as invalid and collusive the *Ikrar*, the cognovit or judgment by confession, and the execution sale, as being collusively obtained from his guardian.

The principal *Sudder Ameen* (*Moulvee Mohumud Ubdoolla Khan*), of *Zillah Allahabad*, made a decree in the Respondent's favour on the 11th of *November*, 1861, awarding him possession of the estate sued for, with Rs. 36,470. 11a. 6p. for mesne profits and damages, but allowing the Appellant to set off against this sum the sum of Rs. 28,418. 3a. 10p., which was compounded of the before-mentioned items of Rs. 26,986. 15a. 4p. and Rs. 1,354. 1a. 9p. On

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appeal, the *Sudder* Court at *Agra*, consisting of Messrs. *Roberts* and *Batten*, by its decree of the 20th of *July*, 1863, generally affirmed this decree, but reduced the damages awarded by an allowance of five per cent. for the cost of collection and management, and by the sum paid for income-tax; and also reduced the reduction or set-off allowance to the Appellant by the item of Rs. 1,354. 1a. 9p. And by its decree of the 31st *May*, 1864, made on an application for review of judgment, the same Court modified its own decree by allowing the Appellant interest on the principal sum of Rs. 26,986. 15a. 4p., which was to be deducted by him, at the rate of five per cent.

The appeal was from this decree.

Mr. *Forsyth*, Q.C., and Mr. *Pontifex*, for the Appellant.

The circumstances in which *Goolab Koonwur*, as guardian of the Minor, was placed at the time of execution in the Appellant's favour of the *Ikrarnamah* of the 17th of *February*, 1850, were such as to render it a proper act on her part. She acted under the advice of those who were interested in the preservation of the ancestral property of the Minor. It is clear that the estate would have been sold on the 20th of *February*, 1851, if the Appellant had not advanced the Rs. 26,986. Such a charge made by a Manager for the benefit of the Minor's estate is good by the Hindoo law. *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (*a*) and authorities there cited (*b*). There was no evidence to show

(*a*) 6 Moore's Ind. App. Cases, 393. (*b*) *Ib.* 407.

fraud and collusion between *Goolab Koonwur* and the Appellant in the transaction, or that the same was prejudicial to the Minor's estate. We submit, therefore, that the auction sale to him was a regular and valid sale which cannot be annulled or set aside, and that he is entitled to possession under the sale. [Lord CHELMSFORD: You get a cognovit for Rs. 54,000 on an advance of Rs. 26,986, borrowed according to your argument to save the estate, but under that cognovit, or confession of judgment, you force a sale yourself and actually buy in the Minor's estate. Can that stand?] The sale was by public auction under a decree of Court whereby the payment of the Rs. 26,986, advanced to save the estate, was decreed. If the transaction as to the *Ikrarnamah* fails, yet the Appellant was a purchaser at an execution sale and a decree holder. His rights were similar to a stranger purchasing, *Ali Hossein* v. *Badel Khan* (*a*). At all events the execution sale was good to the extent of Rs. 26,986, and the decree appealed from, if correct, so far as possession was awarded to the Respondent, does not place the Appellant in the position in which, in equity, he is entitled to be placed, *Brocklehurst* v. *Jessop* (*b*). Both Courts in *India* held that this particular sum, part of the amount awarded to the Appellant by the decree under which the auction sale took place, was actually advanced by the Appellant to *Goolab Koonwur* as guardian of the Minor and registered proprietor of his property, and if the decree had been confined to that sum, the sale of the estate would properly have taken place in execution thereof. Lastly, the Court below was wrong,

(*a*) 19th May, 1863, S. D. A., N. W. P. (*b*) 7 Sim. 438.

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in allowing only five per cent. interest. The *Sudder* Court has no discretion to alter the rate of interest allowed in *India*, namely twelve per cent.

The Attorney-General (Sir *R. Palmer*, Q.C.) and Mr. *Leith*, for the Respondent.

There was no legal contract between the step-mother, the Appellant and the Minor as would in equity bind the Minor's estate. The evidence shows the whole transaction tainted with fraud. [Lord CHELMSFORD: We are satisfied on that point; you will confine yourself to the question, whether interest ought not to have been allowed by the Court at the rate of twelve per cent.] No specific amount of interest was agreed to. The amount of interest is in the discretion of the Court. Here the *Ikrar-namah* and the whole transaction was collusive and fraudulent. In *Lindsay* v. *The Oriental Bank at Colombo* (*a*) a wrong-doer was disallowed his advances, though for business purposes of a firm.

26th Feb. 1866.

Their Lordships reserved judgment, which was now pronounced by

The Right Hon. Sir JAMES W. COLVILE.

After stating the above facts his Lordship proceeded :—

"The first and principal question that arises upon it is whether the *Ikrar* of the 17th of *February*, 1850, which was executed by his guardian during his minority, is binding upon the Respondent.

In dealing with this question we have no difficulty about the *ratio decidendi*, since it is admitted that the principles which govern it have been authorita-

(*a*) 13 Moore's P. C. Cases, 426.

tively laid down in the case of *Hunoomanpersaud Panday* v. *Mussamat Babooee Munraj Koonweree* (6 Moore's Ind. App. Cases, p. 423). It is there said, "The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." And again, p. 424, "The lender is bound to inquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate." It follows, from the passages above cited, and from the rest of this judgment, that he who sets up a charge upon a Minor's estate, created in his favour by the guardian, is bound to show, at least, that when the charge was so created, there were reasonable grounds for believing that the transaction was for the benefit of the estate.

The learned Counsel for the Appellant have not ventured to contend that the stipulations of the instrument, to which these principles have now to be applied, were, upon the face of them, beneficial to the Respondent's estate. Their arguments have been directed to show that the whole transaction might be justified by a consideration of the circumstances in which the parties stood, and of the nature of the litigation in which *Sheodutt Singh* had in his life-time been engaged. It becomes necessary, therefore, to review, as briefly as may be, the very tedious and intricate history of that litigation.

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In 1828, *Seetaram Singh*, the father of the Appellant, had lent, or agreed to lend, Rs. 29,500 to *Sheodutt Singh*, on a mortgage of the ancestral *Talook* now in dispute. The *Talook* consisted of twenty-nine villages, and the mortgage was to be a usufructuary mortgage by way of a lease for ten years of the whole *Talook*. Before this arrangement was completed, it appeared that the two other persons, named *Baijnauth* and *Bishun Dayal*, claimed to be prior mortgagees of part of the *Talook*.

It was at first settled between *Sheodutt Singh* and his mortgagees, that *Seetaram Singh* should apply part of the Rs. 29,500 in paying off *Baijnauth* and *Bishun Dayal;* but it was ultimately arranged between those two persons and *Seetaram*, that the three should be jointly interested in the mortgage; the share of *Seetaram* being taken to be Rs. 17,700, and that of the other two Rs. 11,800. The instrument of the 27th of *May*, 1828, by which this so-called partnership was effected, provided, that if it should be deemed advisable thereafter to dissolve the partnership, the property should be divided and held separately in the proportions above specified.

They entered into possession of the mortgaged property in *June*, 1828, and in 1831 dissolved their so-called partnership; thereupon *Bishun Dayal* and *Baijnauth* became mortgagees in possession of twelve, and *Seetaram* became, or ought to have become, mortgagee in possession of the remaining seventeen villages of the *Talook*.

We say "or ought to have become," because it appears, from the subsequent proceedings, that he never was in possession of five of these villages; they having been transferred by *Sheodutt Singh*

prior to the mortgage to his wives and two other persons.

Seetaram carried on his general business in partnership with one *Sheosuhai*; and on the dissolution of their partnership, and a consequent division of its assets, this mortgage fell to the share of *Sheosuhai*. He was never, however, recognized as mortgagee by *Sheodutt Singh*, nor was his name recorded as mortgagee until after *June*, 1838, when the period of ten years, during which the possession of the mortgagee was to continue, expired. *Sheosuhai* and the other parties then in possession of the mortgaged premises, retained possession after *June*, 1838; they allowed the Government revenue to fall into arrear, in consequence of which the estate was attached, and let in farm, for six years, to one *Ilahee Buksh*, whose security, *Torab Ali*, acquired by assignment the whole of the interest, as mortgagee (if any) of *Sheosuhai*, and also the mortgage rights of *Baijnauth*. Those of *Bishun Dayal* became vested in some other parties.

Torab Ali instituted proceedings on the mortgage securities against *Sheodutt Singh*, claiming the balance alleged to be due on them; but these proceedings, though successful in the Court of first instance, were ultimately dismissed by the *Sudder* Court, apparently on the ground that the mortgage debt had been satisfied by the perception of rents during the possession under the ten years' lease.

In this state of things, and on the 17th of *June*, 1842, *Sheodutt Singh* brought the first suit of which we have any mention against the Appellant and his brother, since deceased, as the sons and representatives of *Seetaram Singh*, and against all the other persons

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who in the course of the transactions lastly above stated had become interested in the mortgage securities or had been in possession of the mortgaged premises. The object of the suit was to recover possession of the property, on the double ground that the principal and interest of the mortgage debt had been liquidated by the collections, and that the period for which the property had been mortgaged had expired; and it also claimed a large sum for the mesne profits of the four years during which it was alleged possession had been wrongfully retained.

It is unnecessary to consider very minutely the merits of this suit, because a final decree had been made in it before *February*, 1850, when the widow of *Sheodutt* executed to *Bunseedhur* the *Ikrarnamah* in question. It is sufficient to state that although the plaint expressly stated that the principal and interest of the mortgage debt had been liquidated by the collections, the Appellant did not dispute that fact. His defence was simply that by reason of the assignments to *Sheosuhai* by his father *Seetaram*, he had ceased to have either interest or liability in the matter.

The course of the suit was as follows:—On the 26th of *June*, 1843, the Principal *Sudder Ameen* decreed in favour of the Plaintiffs for redemption and possession of the estate after the expiration of the farm, but nonsuited the claim for mesne profits and damages. On a remand from the *Sudder* Court, the same Officer, by a decree, dated the 28th of *November*, 1843, made the Appellant and his brother, as co-heirs of *Seetaram*, liable jointly with *Sheosuhai* in the sum of Rs. 16,570. 7a. 9p., as mesne profits for the year 1246, but dismissed the claim for

damages for the years 1247, 1248, and 1249 B.S. It should also be mentioned that he expressly found in his judgment that the mortgage debt had been discharged. There was an appeal from this second decision, and the *Sudder* Court by its original decree on that appeal held, that the Appellant, as the then sole heir and representative of *Seetaram* (his brother having died), was solely liable to the Plaintiffs for the mesne profits and damages due to him; and that the sum awarded by the Principal *Sudder Ameen* ought to be increased by the mesne profits for the years 1247, 1248, and 1249. Their decree seems to have proceeded on the ground that *Seetaram* and his estate were primarily liable to the mortgagor for the nondelivery of the possession when it ought to have been redelivered; and were accountable for the mesne profits of the whole estate, notwithstanding the transfer to *Baijnauth*, *Bishun Dayal*, *Sheosuhai*, and others.

The Appellant applied for and obtained a review of this decree on the grounds that he was improperly charged with the mesne profits of the twelve villages held in possession by *Baijnauth* and *Bishun Dayal*; that he was improperly charged with the profits of the five villages of which, by reason of their assignment to *Sheodutt's* wives and others, *Seetaram* was never in possession; and that he was improperly charged with a certain amount under the head of *Sayer*. And he again raised the question that the effect of the transfer to *Sheosuhai* was to determine the liability of *Seetaram* for the profits of any part of the estate. The majority of the Court decided against the Appellant on the last point, and in his favour on the three others; and the final decree was

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against him for the sum of Rs. 14,865. 10a., being the amount of the profits claimed in respect of the twelve villages of which *Seetaram* was unquestionably in possession after the dissolution of the so-called partpership between him and *Baijnauth* and *Bishun Dayal.* This final decree was dated the 1st of *March*, 1846. The Appellant satisfied this judgment by payments into the Court to the amount of Rs. 26,211. 12a. 9p.; and these moneys were afterwards paid out through the *Mookhtar* of *Sheodutt Singh*, and are those or some of those which in the third clause of the *Ikrarnamah* are alleged to have found their way into the hands of *Mohun Lall.*

The Appellant, having thus satisfied this decree, instituted in the year 1847 a suit against *Sheodutt Singh.* His claim was founded on the wrong done to *Seetaram* by reason of his not getting possession of the five villages assigned to the wives of *Sheodutt Singh*, and was for the profits of those villages during the ten years of the mortgage lease. The gross amount claimed was Rs. 27,129. 6a. 6p. principal, and an equal sum for interest. The proceedings in this suit are not amongst the documents in the Appendix, and for the facts we are referred to the short report of the case in the fourth volume of the *Sudder* decisions for the North-Western Provinces (1849), p. 60.

From that, it appears that the Principal *Sudder Ameen*, on the 31st of *December*, 1847, decreed in favour of the Appellant upon the ground, certainly erroneous, that he had been made to pay the profits of these villages; but he awarded him only so much of the profits as fell within the period of twelve years prior to the institution of the suit; treating

the rest of the claim as barred by the Regulation of Limitation. The *Sudder* Court on appeal reversed this decree, and by its decree of the 26th of *March*, 1849, dismissed the Appellant's suit altogether. The reasons for the judgment are not very clearly expressed; but the Court seems to have been of opinion, that if *Seetaram* had any claim for damages in respect of the failure to give him possession of these villages, he should have sued during the currency of the lease; and that at all events his representative (the Appellant) could not then maintain that action. The Appellant obtained leave to appeal to Her Majesty in Council against this decree; and his appeal was pending in 1850 when the *Ikrarnamah* was signed.

In the meantime, and in 1848, *Sheodutt Singh* had brought his suit against the Appellant for the profits of the *Talook* during the years of the farming lease which were not covered by the former suit, and had obtained a judgment for the sum of Rs. 7,480. 4a. 9p., which is the subject of the fourth clause of the *Ikrarnamah*. He had also commenced a third suit against the Appellant in the name of his son, the Respondent, in respect of property derived by the Respondent from his mother. That suit was undecided on the 3rd of *July*, 1849, when *Sheodutt Singh* died.

Hence at the date of the *Ikrarnamah* the position of the Appellant and the Respondent's guardian with reference to the antecedent litigation was this. The Appellant had been decreed to pay and had paid Rs. 26,211. 12a. 9p. in respect of the final decree of 1846. By the decree of 1848 he had been found liable to pay, but had not paid, Rs. 7,480. 4a. 9p., with (probably) interest and costs. Another suit was pending against him, but had not been decided. On

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the other hand, he had brought a suit to enforce a claim for upwards of Rs. 50,000 against the estate of *Sheodutt Singh*. But this claim had been only partially decreed in his favour by the *Zillah* Court, had been wholly dismissed by the *Sudder* Court, and was the subject of an appeal to *England*.

This being the position of the parties, what were the provisions of the *Ikrarnamah* which the guardian was induced to sign? The first clause, after stating that the Appellant had been unjustly made to suffer the losses which he had sustained, by reason of *Sheodutt Singh's* first suit, partly in order to compensate him for such losses, and partly in order to induce him to abandon the appeal in his own suit, made the estate liable to pay him Rs. 27,000, without interest. This clause was obviously against the Minor's interest, in so far as it reopened the questions closed by the final decree of the 1st of *March*, 1846; admitted the injustice of the claim on which it was founded; and gave compensation to the Appellant for the loss which it had inflicted upon him. It is contended, however, that the success of the appeal was so probable, and the consequences of that success were so serious, that the guardian was justified in spending Rs. 27,000 to avert that danger from the estate. This is the point which has been most laboured at the Bar, but their Lordships can find in the facts before them no reasonable grounds for such a conclusion. In the course of their ingenious argument, the learned Counsel for the Appellant were almost constrained to admit that the particular action was misconceived, inasmuch as it was brought to recover the mesne profits of certain villages of which *ex concessis* the Defendant had not been in possession. They were further obliged to admit that under Reg. XXXIV. of 1803, the interest

of the holder of a usufructuary mortgage in the property would cease on the liquidation by the usufruct of the principal and interest of his debt; and consequently that in any action founded on the breach of the agreement, express or implied, to give possession of the five villages, it was essential to allege and prove that, by reason of the nondelivery of such possession, something still remained due on the mortgage.

Their Lordships have extreme difficulty in seeing how such a suit could have been maintained by the Appellant; since in the first suit of *Sheodutt Singh* against him it had been alleged and proved as a fact, that the mortgage debt had been fully discharged; and he, instead of taking issue on that allegation, had sought to escape liability by showing that by reason of *Seetaram's* assignment to *Sheosuhai* he had no interest whatever in the mortgage. But assuming that he might have maintained such a suit, they have to observe that it would have been founded on a cause of action different from that on which the suit actually brought proceeded; and that it is not to be supposed that if the appeal had come here, this Committee would have taken the unprecedented course, suggested by Mr. *Pontifex*, of reversing a decree that had dismissed a suit improperly conceived, and of remanding the cause in order that it might be moulded into a suit of an entirely different character. To their Lordships it appears that the appeal occasioned no such danger to the Minor's estate; and that there are no grounds for saying that the stipulations of the first clause, so favourable to the Appellant, were for the benefit of the Minor, or could have been reasonably supposed to be so.

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The third clause appears to their Lordships to be of the same character. No plausible reasons have been assigned why the guardian should embark in an expensive litigation in order to recover back from *Mohun Lall* sums for which he would necessarily have to account in the general account then open, and unsettled between him and the estate; or why, in consideration of advances for the purposes of that litigation, she should agree to divide with the Appellant moneys which, if recovered, would belong to the Minor's estate. The latter objection affects also the seventh clause.

There is a conflict of evidence concerning the alleged payment of the sum of Rs. 7,480. 1a. 9p. mentioned in the fourth clause. The oral evidence to negative the payment is undoubtedly very loose and unsatisfactory, and the *Gomastah* of the Appellant has given some evidence of the fact of payment, which he corroborated by the production of an entry in the Appellant's Books. On the other hand, it is remarkable that the Appellant, though examined as a witness on other points, did not depose to this payment; and the circumstance that the claim in respect of which this sum had been decreed was of precisely the same character with those which the first clause of the document had pronounced to be unjust tends to justify the conclusion of the Courts below, that this clause was under colour of an admission of a payment that was never made,—the release of a judgment debt to the prejudice of a Minor's estate. Their Lordships do not think it is necessary to decide the question whether this payment was really made. If it was not made, the clause, no doubt, affords another strong argument against the validity of the

Ikrar; but if it was made, it would not in any degree cure the other defects of that instrument, which would have to be considered as if this clause were not inserted in it. The fifth clause seems to imply the abandonment of the suit pending at the date of *Sheodutt Singh's* death. It was, therefore, also to the prejudice of the estate.

If the above-stated view of the particular clauses of the *Ikrar* be correct, the only ground on which the instrument can be supported is, that the transaction, as a whole, was for the benefit of the estate, because the necessity for obtaining the pecuniary assistance of the Appellant was so urgent that the guardian was justified in submitting to the extraordinary and usurious terms on which it was to be given. There is no proof of such a necessity; and it might be sufficient for the purposes of this appeal to say that, in their Lordships' judgment, the Appellant has wholly failed to relieve himself of the burden which the law casts upon him of showing that he had good grounds for supposing that this transaction was for the benefit of the estate.

Their Lordships, however, are disposed to go further, and to say that the Courts below were warranted in imputing the character of fraudulent contrivance to this transaction.

The negotiation out of which it sprang was one between a *Purdah* woman acting as the guardian and manager of an infant's estate, and a keen man of business, at that time a debtor to the estate. She is induced to sign an instrument which transforms the debtor into a creditor, and heavily burdens her ward's property without consideration, except the merely colourable one of the abandonment of the appeal, and

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the promise of future advances for the purposes of litigation, of which a portion, at least, was neither necessary nor prudent; of litigation which, if unsuccessful, would be ruinous to the estate, and, if successful, was to result in a division of spoils absolutely incompatible with her duty as guardian. It is not shown that, in coming to this agreement, she had the assistance of proper or independent advisers. On the other hand, it is not shown affirmatively by what practice (if any) upon her ignorance or her fears she may have been induced to execute the document. She may or she may not have been fully informed as to what she was doing. But whether she was herself defrauded, or whether she acted in collusion with the Appellant, the transaction was in either case a fraud upon the Respondent.

It has, however, been strongly urged that this finding of the invalidity of the *Ikrar* is not fatal to the title of the Appellant as purchaser at the execution sale. It has been contended that his rights are identical with those which a stranger purchasing at the same sale would have had; that the execution was good, at least, to the extent of the Rs. 26,987 advanced to save the property from sale at the suit of *Mohun Lall*; and that the rights of the Respondent against the Appellant, taking them at their highest, are limited to the recovery of the difference between the last-mentioned sum and the price bid at the execution sale. Another argument in favour of this conclusion was, that the Respondent had not really been injured by the sale of his ancestral property under this execution, because he would equally have lost it if it had been sold at the suit of *Mohun Lall*.

As to the latter argument, it seems sufficient to

observe that we have to deal with the rights of the parties in the events that have happened, not in those that might have happened; that the salvation of the property by other means from the sale at *Mohun Lall's* suit was not absolutely impossible; and that, in any case, an execution for Rs. 26,987 is less formidable than one for upwards of Rs. 70,000. Again, it is to be observed that if the Respondent has been wronged by the sale of his property at the suit of the Appellant, the relief suggested falls very far short of an adequate remedy for that wrong. The property of which he has been deprived was ancestral; and the feeling on the subject of ancestral property is so strong in those Provinces, that the policy of allowing it to be taken in execution and sold under judicial sales has been seriously questioned. And even if no account is to be taken of that feeling, it is notorious that landed property when sold under an execution, rarely, if ever, realizes its full value. It follows, therefore, that to restore the property to the Respondent on the terms of paying to the Appellant what may be justly due to him is far more equitable than the proposed limitation of his remedy to the surplus proceeds of the sale; and the only question is whether the sale has interposed an effectual bar to the application of the more appropriate equity.

Their Lordships concur with the learned Judges of the *Sudder* Court in dissenting from the authority of the case which is stated to have been decided in 1847 by two out of three of the then Judges of the *Sudder* Court of the North-Western Provinces. The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud

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which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong-doing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other.

In the present case, the judgment by cognovit, the execution, and the sale are all tainted with the fraud which entered into the original transaction, the execution of the *Ikrar*. All are parts of the contrivance by which the Respondent has been deprived of his property, and the Appellant has acquired it. Their Lordships, therefore, are of opinion that both the Courts below were right in decreeing that possession of the property should be restored to the Respondent. In considering on what terms this should be done, their Lordships concur with the *Sudder* Court in thinking that the only principal sum for which the Appellant was entitled to receive credit was the Rs. 26,987. That he had no title to the Rs. 27,000 follows obviously from what has been already said. Nor has he, in their Lordships' opinion, shown any better title to the Rs. 1,354. That sum had been advanced for costs for the litigation in which he involved the guardian under the 3rd clause of the *Ikrar*. Of that litigation, if it had been successful, he would have had half the fruits. It was unsuccessful. He cannot be allowed to carry on this kind of speculation at the risk and cost of an infant's estate.

The only remaining point—and it is one on which their Lordships have felt some difficulty—is the rate of interest to be allowed on the Rs. 26,987. The Attorney-General has insisted that it was a favour to the Appellant, in the circumstances, to give him any interest at all on that sum; that the rate was in the discretion of the Court below; and that their Lordships should not interfere with that discretion. On the other side, it has been argued that the rate ought to be twelve per cent., such being the current rate of interest, and that which the judgment debt of *Mohun Lall* would naturally have carried. The contention below on the hearing of the application for a review was, that the rate should be six per cent., or the contract rate, as shown by the confession of judgment. Their Lordships have come to the conclusion that the third course is that which should be adopted. If interest was to be allowed at all—and they think the Court below was right in allowing it—the rate should be fixed according to some principle, not according to the arbitrary discretion of the Judges. On the other hand, the Appellant has no right to complain if he receives interest at the rate for which he stipulated when he made the advance. It may be true that he would not have advanced his money on terms so favourable to the estate if he had not had in view the corrupt advantages for which he had stipulated in the *Ikrar*. But there is no reason why the Court, because it will not let him reap the benefit of those improper stipulations, should make a new contract for him in respect of this particular advance.

On the whole, then, their Lordships will humbly recommend to Her Majesty that the decree of the *Sudder* Court be modified by the allowance of interest on the

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Rs. 26,987, at the rate of six per cent. instead of that of five per cent. per annum, but that in all other respects that decree be affirmed with costs. They do not think that so slight a modification ought to deprive the Respondents of the costs of this appeal.

TARAKANT BANNERJEE - - - *Appellant;*

AND

PUDDOMONEY DOSSEE, RASMONEY DOSSEE, AND OTHERS - } *Respondents.**

On appeal from the Sudder Dewanny Adawlut of Bengal.

12th Feb., 1866.

In 1814 a litigation commenced between a *Zemindar* and his tenants, called the *Moonshees*, by reason of the *Zemindar* dispossessing them of lands held under a *jote* tenure. A decree was made in favour of the *Moonshees*, when the *Zemindar* assessed the *jote* lands at a rent. The rent fell into arrear, and under a decree the *jote* lands were, in 1836, sold in satisfaction of the arrears and purchased by *J.* The decree-purchaser was put in possession in 1839. There was another suit pending between the *Moonshees* and their mortgagee, in which a question arose whether these *jote* lands were included in the mortgage, which was decided in favour of the Mortgagee in 1841, but *J.*, the then *jote* tenant, was no party to that suit, and continued in possession of his *jote* lands. Disputes arose between the mortgagee and *J.*, the *jote* tenant, and by an Order of the *Sudder* Court made in 1845, the *jote* lands were ordered to be put in possession of the mortgagee. In 1856 a suit was brought by *J.'s* repre-

THIS appeal was brought from a decree of the late *Sudder Dewanny* Court of *Bengal*, affirming a decision of the principal *Sudder Ameen* of the *Zillah*

* Present:—Members of the *Judicial Committee*—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

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Court at *Dacca*, which dismissed the Appellant's suit, on the ground that the cause of action had arisen twelve years before the suit was brought, and, therefore, barred by sec. 14 of the *Ben.* Reg. of Limitation of Suits, III. of 1793.

That suit was brought on the 28th of *August*, 1856, to recover possession of 1,384 *beegahs* and 14 *cottahs* of land, described as *jote* (tenants' land) set out by fixed boundary, situate in *Mouzahs*, *Narainpoor*, *Khoondkarkandee*, *Goonegerkandee*, and *Kuddumpoor*; together with a dwelling-house and mesne profits; and also to annul or reverse a summary Order of the *Sudder Dewanny Adawlut*, made in a miscellaneous, or summary suit, bearing date the 18th of *November*, 1845.

The decree of the *Sudder Dewanny Adawlut*, appealed from, proceeded on the assumption first, that the possession of the lands and house in question by one of the Respondents, *Rasmoney Dossee*, the principal Defendant, was an adverse possession for a period of more than twelve years before the suit was brought; and that, therefore, the same was barred by effluxion of time under *Ben.* Reg., III. of 1793,

sentative to set aside that Order and to recover possession of the *jote* lands. The Courts in *India* held that there had been adverse possession from 1841, and that the suit was barred by *Ben.* Reg., III. of 1793, sec. 14. Upon appeal held: that as *J.*, the *jote* tenant, was not a party to the suit, under which the decree was made in 1841, the decree was not binding on him or those deriving title through him, and that the suit was not barred by effluxion of time by the Regulation, as the cause of action only arose in 1845.

It is the practice of the Courts in *India* not to give possession under a judicial sale by removing one who is in possession under an apparent *bonâ fide* title. As a debtor can only assert his title to possession by a suit, so a decree-holder who derives his title through him must assert his title by a regular suit.

The practice of including in the transcript record prepared and printed in *India*, under the Order in Council, 13th *June*, 1853, voluminous accounts and receipts, unnecessary to the question at issue, condemned.

Directions given in taxing costs to disallow all expenses occasioned by the insertion in the transcript of such unnecessary matters.

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sec. 14; and secondly, that the fraud and collusion which had been pleaded and charged by the Appellant against her and the other Defendants, had not been proved, so as to entitle the Appellant to have a period of four years deducted from the twelve years in calculating the period of limitation.

The decision of the Principal *Sudder Ameen* proceeded upon the construction of the same section of the Regulations of Limitation of Suits, and dismissed the Appellant's suit; but that Judge assumed an adverse possession from a still earlier date than that fixed on by the *Sudder Dewanny Adawlut*, and in that respect the decree was set aside and reversed by the appellate Court.

The question raised in the suit and on appeal was confined to this point, whether the 1,384 *beegahs* and 14 *cottahs* were, as contended for by the Appellant, included in and belonged to the *jote* lands, of which the *jote jumma* (tenant rent) had been purchased at a judicial sale on the 10th of *June*, 1836, by the Appellant; or whether they were, as insisted by the Defendants, included in and belonged to a *Muskoree Talook* called *Ooturnarainpore*, paying revenue direct to Government, purchased by one *Rajchunder Rae*, deceased, the late husband of *Rasmoney Dossee*, at a judicial sale under a decree made in a suit brought against *Reazooddeen* and others, to enforce a *Kutkubala*, or deed of conditional sale, alleged to have been executed by them in favour of *Rajchunder Rae*.

The material facts of the case appear in the judgment of their Lordships.

As no appearance was put in for the Respondents, the appeal was heard *ex parte*.

The Attorney-General (Sir *R. Palmer*, Q.C.), and Mr. *Leith*, for the Appellant.

The two decrees of the *Sudder* Court and the *Sudder Ameen*, dismissing the Appellant's suit as barred by *Ben.* Reg. of Limitation, III. of 1793, sec. 14, were erroneous. That section prohibits the Court from hearing or determining the merits of a suit if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it. The present suit was commenced within twelve years from the true date of the cause of action, therefore, that Regulation is no bar to the suit.

It was established that, previous to that suit having been brought, two other suits had been commenced, on account of the same cause of action, and had been regularly carried on by those through whom the Appellant immediately derived title to the lands in question. Each of those suits was commenced long before the expiration of the twelve years' limitation, but even if the two other suits had not been brought, the Appellant was within the saving clause or exception in the above section, as he established that he directly preferred his claim, within the twelve years, for the matter in dispute to a Court of competent jurisdiction to try the demand. He had intervened in the suits in accordance with the prescribed forms of procedure. Upon the question of limitation, *Doorgapersaud Roy Chowdry* v. *Tarapersaud Roy Chowdry* (*a*), *Mussumut Chundrabullee Debia* v. *Luckhea Debia Chowdrain* (*b*) and *Rajah Enayet Hossein* v. *Sayud Ahmed Reza* (*c*) were referred to. The charge of collusion and fraud we admit cannot be sustained.

(*a*) 8 Moore's Ind. App. Cases, 308. (*b*) *Ante*, p. 214.
(*c*) 7 Moore's Ind. App. Cases, 238.

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The consideration of the judgment was adjourned, and now pronounced by 26th Feb., 1866

The Right Hon. the Lord Justice TURNER.

The suit of the Plaintiff was instituted on the 28th of *August*, 1856. It was brought to recover 1,384 *beegahs*, and 14 *cottahs* of land, described as "*jote*," set out by fixed boundaries, and situate in certain *Mouzahs* or *Kismuts* called respectively *Narainpore*, *Khoondkarkandee*, *Goonerkandee*, and *Kuddumpoor*; and also to reverse a summary Order of the *Sudder Dewanny Adawlut*, bearing date the 18th of *November*, 1845, made in a miscellaneous or summary suit in that Court. The *Zillah* Court dismissed the suit of the Plaintiff on two grounds,—first, that it was barred by the law of limitation, and secondly, that the matter had been decided adversely to the Plaintiff's claim in a former suit, by which the Court adjudged him to be bound. The *Sudder* Court, on appeal by the present Appellant, decided the case against him on the law of limitation only, and expressed no opinion on any other point. The decision of the *Sudder* Court on the law of limitation proceeded on a different ground from that on which the Lower Court had founded its decree, dating possession under the adverse title from a time later than that which the *Zillah* Court had fixed for its commencement. The Appellant reckoned the time of his dispossession from the 18th of *November*, 1845, the date of the decree for the reversal of which his suit is brought. If he is right in this view of the subject, his suit was brought in time. The *Sudder* Court carried the adverse possession back to an earlier Order of the Court, bearing date the 11th of *April*, 1844, and counting the time

of adverse possession from that last date, it held the suit to be barred by effluxion of time. The *Zillah* Court, in their judgment, had carried the time still further back to the year 1841, considering that the Plaintiff's dispossession was effected by possession having, as the Court considered, been at that time delivered to the Plaintiff in another suit, to which we shall presently refer, by one *Ramgottee Rae*, the *Ameen* delegated by the Court to execute the decree in that suit. The case is somewhat complicated by reason of the long continuance of litigation between different parties, and the conflict of claims in two different concurrent suits. It is necessary, therefore, to state the nature of this litigation and the titles of the Appellant and of the principal original Respondent, *Rasmoney Dossee*, in order to clear the subject of possession from some confusion in which it has become involved.

The *jote* tenure is a dependent tenure within and part of a *Zemindary*, called *Pergunnah, Taleehate, Ameerabad.* In the month of *February* in the year 1814, a litigation commenced between the *Zemindar* and three persons named *Reazooddeen Mahomed, Fyzooddeen Mahomed*, and *Mahomed Cossim*, termed the *Moonshees* (a description which for the sake of brevity it will be convenient to adopt). The *Moonshees* complained that they had been dispossessed by the *Zemindar* of their *jote* tenure, including the lands claimed in this suit; the *Zemindar* denied that inclusion, and claimed them as part of his *Zemindary.* At this time the *Moonshees* were possessed of a *Talook* called *Ooturnarainpore*, paying revenue direct to Government; and throughout their litigation with the *Zemindar*, during their claim to the one property and concurrent possession of the other, they insisted that these lands were included in their *jote* tenure.

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and made no claim to them as included in the *Talook*; proof of this inclusion in the *Talook* would have been a complete answer to the claim of the *Zemindar*, and would have freed them from dependence on his title and the risks attendant on a subordinate tenure.

The *Moonshees* succeeded in that litigation, and the decree in their suit declared the lands to be part of the *jote* tenure, and limited the *Zemindar's* claim to a title to assess them for rent. The *Zemindar* appealed against this decree, which was, however, affirmed, and *Byrubchunder Bannerjee*, an *Ameen*, was ordered to give possession of the lands to the *Moonshees*. This was done in conformity to the decree, and possession was given in the usual way by the *Ameen*, by taking *Kabooleats* from the cultivators, and by fixing bamboos to mark the boundaries. The *Ameen's* report to this effect was in evidence before the Court. There is no evidence of any subsequent disclaimer on the part of the *Moonshees* of this tenure so pleaded, proved and adjudged, nor of any attempt to withdraw any part of the lands from the *jote* tenure, on the ground of mistake or otherwise, and to ascribe them to the *Talook* title before the time of the judicial sale which is now about to be stated. The rent of the *jote* tenure fell into arrear, the *Zemindar* sued the *Moonshees* for rent, recovered in the suit, and caused the *jote* tenure to be sold in satisfaction of the debt due under this decree. This sale took place on the 10th of *June*, 1836, and one *Juggutchunder Rae* was the purchaser. The Appellant's title is derived from him under two intervening private sales, one by *Juggutchunder Rae* to one *Ramdhone Sircar*, and the other by the sons and heirs of *Ramdhone Sircar* to the Appellant. By this purchase, *Juggutchunder Rae* obtained the right, title, and

interest of the *Moonshees* in the *jote* tenure. He became, by force of this purchase, in the same relation to the *Zemindar* in which the *Moonshees* before stood. As against the *Moonshees* themselves and the *Zemindar*, the title of the purchaser was that which the *Moonshees* had had adjudged to them in their suit against the *Zemindar*. The possession given to the purchaser was co-extensive with that given to the *Moonshees*, and it was in strict conformity to the law which obtains in those Courts. The tenants were properly directed to attorn, and properly attorned to that title. It is important to keep this origin of the possession clearly in view.

The *Moonshees* appear to have disputed at that time, the title of the auction purchaser to have these lands included in his purchase; they claimed them then as included in their *Talook*. It is the practice of those Courts, and it is one perfectly consistent with reason and justice, not to give possession under a judicial sale by removing the possession of one who is in possession under an apparent *bonâ fide* title. If the debtor can assert his title to possession by suit only, the new owner of his title can have no higher claim. The Court, therefore, leaves the purchaser to assert his title by regular suit. In this case, however, the *Moonshees*, the debtors under the decree, were themselves in possession. The decree was for rent of the *jote* tenure; the *Zemindar* caused the tenure, including these lands, to be put up to sale; the *Moonshees*, in claiming these lands, had pleaded this tenure, and it was adjudged in their favour by a suit which bound both them and the *Zemindar*. The suit for rent was against them as *jote* tenants, for rent due under that very tenure, and the demand included

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the rent of these lands; consequently, the Court which directed the execution of the decree was perfectly justified in acting on their own pleaded, and by them admitted title, and putting the decree purchaser in possession. This was done in the regular mode, by taking *Kabooleats*, except as to one small part, as to which, however, possession was also given, and the purchaser was thus put in complete possession of these lands under the *jote* tenure. This appears from the report of the *Ameen*, dated the 7th of *August*, 1839. Unless this possession was changed at some intermediate period between the 5th of *August*, 1839, the date of the delivery of the possession above stated, and the 18th of *November*, 1845, the date of the Order of the *Sudder* Court which is sought to be reversed, the objection that the suit is barred by limitation of time is groundless. If that possession was displaced, in fact, it would be unimportant whether the disturbance took place in a suit to which the purchaser was a stranger, or in one to which he was a party, the possession being alike adverse on either supposition. In considering this question, it is not necessary to state minutely all the intermediate steps before the delivery of possession by the *Ameen*, *Ramgottee*, on which the *Zillah* Court relied. That *Ameen* was acting in the execution of a decree in another suit which had been pending between the *Moonshees* and their mortgagee of their *Talook*. A dispute had arisen between them of this nature: the mortgagors had mortgaged the *Talook*, but, as they contended, excepting these lands from it, as to which they were carrying on a litigation with the purchaser of the *jote* tenure. The mortgagee, on the other hand, insisted that these lands were included

in the mortgage. The suit was decided in favour of the mortgagee, and, as between him and the *Moonshees* these disputed lands were adjudged to be within the *Talook;* but as the *jote* tenant was not a party to that suit, the decision in it did not bind him. The mortgagee obtained execution of that decree, and it was under this proceeding the *Zillah* Court considered that the Appellant was dispossessed, and the possession given to the mortgagee in the year 1841. The proceedings and the decree, however, are not in evidence in this appeal. In the execution of that decree a conflict arose between the purchaser of the *jote* tenure and the mortgagee, as decree-holder, each party claiming the same lands, but the *jote* tenant being in possession.

If this title of the mortgagee could be successfully asserted against the purchaser of the *jote* tenure, it could be asserted legally in no other mode than by a regular suit instituted for that purpose, for such a possession as that of the *jote* tenant could not be changed merely in proceedings to execute a decree. This appears to have been entirely overlooked, both by the *Ameen Ramgottee Rae*, and by the *Zillah* Court in the consideration of his acts. It appears that the *Ameen* did, in effect, attempt to disturb the possession of the *jote* tenant, and that he took fresh *Kabooleats*, from the cultivators who had before attorned to the *jote* tenant under the direction of the Court. The Court, however, on the complaint of the *jote* tenant, set that matter right, and directed, in substance, the cancellation of the new *Kabooleats*. The legal effect of this Order of the Court was, to set up the original *Kabooleats*, and to restore or confirm the *jote* tenant's possession. Now, there is not only no evidence of

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any subsequent change of possession before the decree of the *Sudder* Court of the 18th of *November*, 1845, pronounced by Mr. *Reid*, but the very language of that judgment conflicts with such a supposition, for by that judgment, which was adverse to the *jote* tenant, the possession was ordered to be restored by him to the *Talookdars*. It is plain that there is no error in the language of the judgment; it is language perfectly consistent with the Order of the Court directing the second set of *Kabooleats* to be brought in, and it is also consistent with the course of practice in executing decrees. It is plain, therefore, that both Courts have fallen into error on the point of possession, and that the Appellant is perfectly correct in maintaining that he was dispossessed only by virtue of the decision which he seeks to reverse. The act of the Court which directs the cultivators to attorn is, of course, not designed to expose them to risk of forfeiture; their simple obedience to the act of the Court, in pursuance of the mode in which it executes a decree, could not be attended with that consequence; and when the Court corrected its error, it meant to restore, and did in law restore, the old possession. As their Lordships think that the possession was not, in fact, disturbed until within the period of twelve years from the institution of this suit, it becomes unnecessary to consider whether the claim would have been kept alive through the whole time by the litigation as to the execution of the decree.

The other point on which the *Zillah* Court decided against the Appellant was, that the matter was already adjudged in a suit by which he was bound. It has been stated that the original purchaser at the auction sale of the *jote* tenure, sold to one *Ramdhone Sircar*.

Before this sale, he had instituted proceedings against the decree-holders under the title of the *Talook*. *Ramdhone Sircar* purchased, therefore, *pendente lite*. He applied to be substituted in the suit, in lieu of *Juggutchunder Rae*, which application was granted. This litigation terminated in the *Zillah* Court in favour of *Ramdhone Sircar*, the *jote* tenant. From that decision *Rasmoney Dossee* appealed. On her appeal the *Sudder* Court reversed that decision. This was the decree of Mr. *Reid* of the 18th of *November*, 1845, which this suit seeks to set aside.

On this, *Ramdhone Sircar* instituted a regular suit against *Rasmoney Dossee* and others, claiming, in substance, the same relief which is sought by this suit. Pending that suit, *Ramdhone Sircar* died, and his three sons, *Mohemachunder Sircar*, *Anundchunder Sircar*, and *Greeschunder Sircar*, were substituted in his place on the record. Pending this litigation, the present Appellant purchased the *jote* tenure from the sons of *Ramdhone Sircar*. He applied in his turn to be substituted on the record and to conduct the suit. One of the sons, however, denied the purchase, and the Court refused the application. In a few days afterwards, the cause was decreed for the Defendants. It is alleged that the actual Plaintiffs conducted their case negligently, if not collusively. On the argument before their Lordships, the Attorney-General abandoned the case of fraud, but contended that the Plaintiff was not barred by this decision; that he was not a party to the suit; and that his application to intervene in it having been refused, it would be unjust and inconsistent to hold him bound by the decree; that the decision followed so promptly on the refusal to allow him to intervene, that he could not reasonably be

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expected in the interval either to appeal against the order refusing him leave to intervene, or to institute a suit as supplemental to the one in which he sought to intervene. Their Lordships concur in this view of the subject. As the law allows a party interested to intervene in the suit, that right should not be rigorously dealt with. There is much danger in *India* of secret collusion. Their Lordships think that the Defendants who obtained their decree so shortly after the above refusal, in the absence of the party really interested in contesting the matter with them, should not be permitted to prevail by this objection.

The cause has not been decided in either Court on the principal point—whether the lands formed part of the *jote* tenure or of the *Talook*. Their Lordships are unfortunately unable to decide this appeal finally by reason of this defect. The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinions on all the important points. In the present case, the merits not having been entered into in the Courts below, their Lordships find themselves unable to dispose of the suit; and as they do not agree in the opinion either of the *Sudder* or of the *Zillah* Court, they will humbly recommend to Her Majesty that the decisions of both Courts should be reversed, and that the High Court at *Calcutta* should

remand the cause for hearing in the *Zillah* Court on the issues on the merits other than the issues already decided in this Court on appeal.

Their Lordships will further recommend that the costs of the appeal be paid to the Appellant, and that it be referred to the Registrar of this Court to tax the costs of the appeal, with directions to disallow all such costs and expenses as may have been unnecessarily occasioned by the inclusion in the transcript sent from *India* of matters which he shall consider to have been improperly introduced therein, and that any taxation which may be had in *India* be regulated by the course which the Registrar of this Court may adopt.

Their Lordships have observed with regret the frequent inclusion of voluminous papers, accounts, and receipts in the transcripts printed in *India*, and sent over in that form to the Registry of the Privy Council, an evil which appears to be on the increase; and their Lordships trust that the attention of the Courts in *India* from which appeals lie to Her Majesty, will be directed to the subject, with a view to provide a remedy for a very serious evil (*a*).

(*a*) The transcript record (which was printed in India, under the Order in Council of the 13th June, 1853, sec. III.), contained upwards of 1000 pages, a great portion of which consisted of accounts and receipts.

RAMPERSHAD TEWARRY - - - *Appellant,*

AND

SHEOCHURN DOSS, or LOLL TEWARRY, MUSSUMAT THOOKRA and others } *Respondents.*

And in a cross appeal by

SHEOCHURN DOSS - - - - *Appellant,*

AND

RAMPERSHAD TEWARRY- - - *Respondent.*

And in another cross appeal by

MUSSUMAT THOOKRA - - - *Appellant,*

AND

RAMPERSHAD TEWARRY - - *Respondent.**

On appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

8th, 9th, & 10th Feb. 1866.

THESE appeals arose out of a suit instituted by the Appellant, *Rampershad Tewarry,* who was one of five brothers, against his brothers' representatives in

D., one of five brothers, constituting an undivided Hindoo family, but having no ancestral estate, acquired personal property with which, with the aid of his brothers, he established and carried on a banking business at five different places. Such circumstances, under the general principles of Hindoo law, held to constitute a joint family property in which the brothers were entitled to share.

* Present:—Members of the *Judicial Committee,*—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

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the Court of the Principal *Sudder Ameen*, which suit was afterwards transferred to the Civil Court at *Agra*, to enforce his claim as a member of a joint undivided Hindoo family, to a fourth share of the joint estate in five several Banking firms respectively established in the *Agra*, *Jhoosee*, *Ghazeepore*, *Benares* and *Mirzapore*; also to set aside a deed of partition and a deed of gift whereby the Respondent, *Mussumat Thookra*, purported to give the share awarded to her under a deed of partition to one of her husband's brothers' sons named *Sheochurn Doss*.

Sheodut Tewarry, the ancestor of the parties, was a Priest, and had five sons, named *Gunga Pershad*, *Moona Loll*, *Radakishen*, *Deenanath*, and the Appellant, *Rampershad*. *Sheodut* had no ancestral estate. *Deenanath*, from capital acquired by him, established the five Banking firms, taking his four brothers into the business, and accumulated a large fortune. The family continued undivided, but in 1848 the Appellant, *Rampershad*, separated from the joint firms and conducted the *Mirzapore* Banking branch alone. In 1850, *Deenanath* died, leaving a childless widow, the Respondent, *Mussumat Thookra*. By a deed of partition, dated the

The burthen of proof that such was only an ordinary partnership, and not a jointly acquired family property, lies on the party claiming it to have been separately acquired.

Ordinary co-partnership property is not subject to the rule of Hindoo Law, which excludes a widow from the succession at her husband's death to a share of the joint property of an undivided family.

The *Sudder* Court having established that the family was joint and the property undivided, awarded a gross sum out of the estate, calculated to make the widow of one of the brothers a monthly payment for maintenance. Held that although a Court of Equity in this country would have set apart a certain sum to a separate account during the lifetime of the widow, yet from the want of machinery in the Native Courts in *India*, such practice could not be carried out.

Where a Defendant refused to render accounts, and there was evidence of spoliation of the Banking Books, the Court charged him with the principal sum for which he was accountable, with interest at 12 *per cent. per mensem* in lieu of the profits he failed to account for.

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23rd of *February*, 1825, the estate of *Deenanath* was divided into four parts and apportioned between the brothers, *Gunga Pershad*, *Moona Loll* and *Radakishen*, or their representatives, and the Respondent, *Mussumat Thookra*, who was allowed her husband's share to the exclusion of the Appellant, *Rampershad*, on the ground of his separation from the other members of the family in the year 1848. This share was afterwards given by a deed of gift dated the 7th of *September*, 1855, by the Respondent, *Mussumat Thookra*, in favour of *Sheochurn Doss*.

The nature of the pleadings and effect of the evidence is sufficiently set forth in the judgment. The Appellant, it appeared, had refused to account for the receipts and disbursements of the *Mirzapore* branch of the Banking firm he was in possession of, and, as alleged, had tampered with and altered the Books of that firm.

The case of the Appellant was, first, that the Banking business had been established and the capital thereof acquired, not by the five brothers, but by their father, *Sheodut Tewarry*, or from his ancestral estate, and that by the Hindoo law, on the death of *Deenanath*, without issue, the surviving brothers, or their representatives, succeeded to his share, to the exclusion of his widow, who had no interest in his estate beyond maintenance; and secondly, that a deed of partition, in 1843, relied upon by the Respondents was fraudulent. On the other hand the Respondent, *Mussumat Thookra*, the widow of *Deenanath*, contended that her husband was the founder of the business, that he had associated his brothers only as ordinary partners, that the firm had not been established with ancestral capital, there having been

in fact none, and, therefore, that she, as a childless widow, was entitled to her husband's full share of the profits in the business. The case of the other Respondents was, that in the year 1852, a division of the estate of *Deenanath* had been made between his widow and the representatives of *Deenanath's* brothers, which excluded the Appellant, *Rampershad*, he having separated from the Banking firm four years before *Deenanath's* death. The *Sudder* Court at *Agra*, consisting of Messrs. *R. B. Morgan* and *M. R. Gubbins*, two of the Judges of that Court by a decree, dated the 9th of *June*, 1860, held that *Sheodut*, having died without leaving any capital, and that there was no ancestral estate, the whole capital having been acquired solely by *Deenanath*, who had associated the names of his brothers with his own in the several firms from natural affection; and that being a joint family, the widow was entitled only to maintenance, which was fixed by the Court at Rs. 150 *per mensem*, and not to any share of her husband's estate, which the Court held belonged to the brothers equally; and it was ordered that the Respondent, *Sheochurn Doss*, should pay only a portion of the claim made, by reason of the Appellant having received a considerable sum more than he was entitled when he separated from his brothers, for which the Court charged him with twelve per cent. interest. The other Respondents were exonerated from the Appellant's claim.

From this decree *Rampershad* brought the present appeal, and *Sheochurn Doss* and *Mussumat Thookra* cross appeals. These appeals were, upon petition, ordered by the Judicial Committee to be consolidated and heard together.

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The consolidated appeals were argued by

Mr. *Rolt*, Q.C., and Mr. *Leith*, for *Rampershad Tewarry*.

The Attorney-General (Sir *R. Palmer*, Q. C.), and Mr. *Cave*, for *Sheochurn Doss*.

Mr. *Piffard*, for *Mussumat Thookra*, and

Mr. *J. Anderson*, Q.C., and Mr. *W. Downing Bruce*, for the Respondents, *Mussumat Sudoo, Buldeo Doss, Bhyronpershad, and Mussumat Bilassa*.

The points mainly insisted upon by the Appellant in support of the appeal are stated and commented upon in the judgment.

As to the presumption of Hindoo law, with respect to the five brothers constituting in the Banking business an undivided Hindoo family, or merely a copartnership, there being no ancestral funds and the brothers living apart at the different Banking firms, and also the effect of the separation in the year 1848, The *Mitacshara* (by *Colbrooke*), ch. II. sec. IV. pp. 346, 8, *Elberling's* Treatise on Inheritance, Gift, &c., by Mahomedan and Hindoo Law, p. 79, *Katama Natchier* v. *The Rajah of Shivagunga* (*a*), were referred to.

On the assumption of the Banking firms being only a copartnership; then as to the right of the widow to one-fourth share, *Dayabhaga*, ch. XI. sec. I. p. 158, *W. H. Macnaghten's* Princ. of "Hindu Law," Vol. I. p. 47, or in the alternative of the family being united, her title to maintenance only, *W. H. Macnaghten's* Princ. of "Hindu law," Vol. I. p. 19, and *ib.* Vol. II. p. 21, were cited; also that the *onus probandi*

(*a*) 9 Moore's Ind. App. Cases, 539, 606.

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that her husband's property was separately acquired, *Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry* (*a*); *Dhurm Pandey* v. *Mussumat Shama Soondri Dibiah* (*b*).

And, as to the refusal to give in the accounts, and the alleged spoliation of the Books of the *Mirzapore* firm by the Appellant, *Rampershad's*, it was submitted that the charge made by the *Sudder* Court in taking the accounts of the assets of the family, in deduction of that Appellant's claim, at the rate of twelve *per cent.* for the principal sum he was accountable, was, in the circumstances, correct, referring to *Gray* v. *Haig* (*c*); *Wardour* v. *Berisford* (*d*).

17th March, 1866.

The consideration of their Lordships' judgment was reserved, and now pronounced by

The Right Hon. Sir JAMES W. COLVILE.

The suit out of which these appeals have arisen was brought by *Rampershad Tewarry* to enforce his claims against the other members of a joint and undivided Hindoo family. The common ancestor of the Plaintiff and the Defendants was one *Sheodut Tewarry*, who lived at *Jhoosee*, a village on the *Ganges*, opposite to *Allahabad*, and exercised there the functions of a *Purohit*, or Priest. He died in 1802, and is not shown to have left any property except the house, such as it was, in which he lived, and the *Huqq Purohittai*, or Priests' fees, the right to which seems to have been hereditary. He left five sons, *Gungapershad*, *Moona Loll*, *Radakishen*, *Deenanath*, and the Plaintiff, *Rampershad*.

Radakishen died in 1840, leaving three sons, *Buldeo*

(*a*) *Ante*, p. 403.
(*b*) 3 Moore's Ind App. Cases, 229
(*c*) 20 Beav. 219.
(*d*) 1 Vern. 452.

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Doss, *Bhyronpershad*, and *Seetulpershad*, all of whom were Defendants below; but *Seetulpershad* has since died, leaving three infant sons, who are represented on the record by *Mussumat Bilassa*, their mother and guardian.

Gungapershad died in 1846, leaving three sons, *Sheochurn Doss* or *Loll Tewarry*, the principal Defendant below and Respondent here; *Bheekum Singh*, a Defendant below, who has since died without issue; and *Bhugwan Doss*.

Deenanath died in 1850 or 1851, without issue, but leaving a widow, *Mussumat Thookra*, one of the Respondents and a cross Appellant.

Moona Loll, who survived *Deenanath*, is dead; but there is some confusion as to the date of his death. From the partition deed of the 23rd of *February*, 1852, which is afterwards referred to, we should infer that he was dead at that date. From other parts of the record, it would appear that he was alive in *April*, 1857, and died between that month and *June*, 1858. Whenever he died, he left an only son, *Seohpershad*, a Defendant below, who has since died, leaving two sons, the Respondents, *Soorujpershad* and *Ramnath*.

The evidence concerning the precise history of the family after the death of *Sheodut* is conflicting and will be afterwards considered. It is, however, undisputed that for a considerable period between the years 1818 and 1848, the five brothers or their children carried on a flourishing Banking business, on some terms of partnership or joint interest, under five different firms. Of these, one was established at *Jhoosee*, the ancestral seat of the family, under the style of "*Moona Loll & Gungapershad*;" another at *Agra*, under the style of "*Radhakishen & Deenanath*;" a third at *Benares*, under the style of "*Gungapershad*

& *Rampershad;*" a fourth at *Ghazeepoor*, under the style of "*Rampershad & Sheochurn Doss;*" and the fifth at *Mirzapoor*, also under the style of "*Rampershad & Sheochurn Doss.*"

The *Mirzapoor* firm was under the management of the Plaintiff, *Rampershad;* and it is alleged by the Defendants, though not admitted by the Plaintiff, that about the year 1848 he separated himself from the rest of the family, appropriating to himself the assets and property of that firm. That about that time he was on bad terms with the other members of the family, and ceased to render the accounts of the *Mirzapoor* to the *Jhoosee* firm according to the course of business theretofore subsisting, seems to be pretty certain; but there is no proof of a formal separation or dissolution of partnership at that date.

On the 23rd of *February*, 1852, the adult members of the family other than *Rampershad*, viz., *Sheopershad*, as representing *Moona Loll; Sheochurn*, for himself and as guardian of his infant brothers, as representing *Gungapershad; Buldeo Doss*, for himself and as guardian of his infant brothers, as representing *Radakishen;* and *Mussumat Thookra*, as representing her husband *Deenanath*, executed a deed of partition, which stated that the five brothers had been associated in partnership in trade and banking since 1874 *Sumbut* (corresponding with A.D. 1818); that the five before-mentioned Banking firms had been established; that in 1904 *Sumbut* (1848) *Rampershad*, who was at *Mirzapoor*, having taken as his share Rs. 1,16,197. 10a. in cash and houses situated at *Mirzapoor*, had separated himself and ceased rendering accounts and correspondence in regard to the property in his possession; and that

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similarly, he having no concern with the firms of *Agra, Jhoosee, Ghazeepoor*, and *Benares*, the undersigned being the partners of those firms, with a view to obviate future disputes and contests, had examined the accounts of the firms and the property appertaining thereto, and found in cash Rs. 503,418. 8a., which they had amicably divided into four equal shares, each share amounting to Rs. 125,996. 4a., and had separated themselves. The deed then provided for the future division of some outstandings, which were to be held jointly until realization; and for the division of certain boats, and the warehouses and shops there mentioned, but stated that the houses situated at *Jhoosee* were to remain in the joint possession of the four parties. The effect of this instrument was to exclude *Rampershad* from any participation in the property which was the subject of the partition, and to give a fourth share to *Mussumat Thookra* as the widow and representative of *Deenanath*. This fourth share she afterwards, by an instrument dated the 7th of *September*, 1855, assigned to *Sheochurn Doss*.

The suit was commenced on the 4th of *January*, 1856, in the Court of the Principal *Sudder Ameen*, whence it was transferred to the Civil Court of *Agra*. The plaint claimed a one-fourth share of the property therein specified, giving credit for Rs. 1,16,197. 10a., the assets of the firm of *Mirzapoor* in Plaintiff's possession; and to set aside the deed of partition of the 23rd of *February*, 1852, and the deed of gift of the 7th of *September*, 1855.

It may be necessary to examine the pleadings more particularly hereafter, for the purpose of considering the weight of certain arguments which were addressed

to their Lordships on the hearing of these appeals. At present it is sufficient to say, that the material questions in the cause were, whether the property of which a share was claimed, and in particular the property of the Banking firms, was the joint and undivided property of the family; and consequently, whether, by the Hindoo law, as it obtains in the North-Western Provinces, the Defendant, *Mussumat Thookra*, was incapable of taking a share of it; and further, whether, by his conduct in 1848, the Plaintiff had effectually separated himself from the rest of the family, and had conclusively bound himself to take the assets of the *Mirzapoor* firm in full satisfaction of his share and interest in the joint concerns.

The Civil Judge of *Agra*, by an Order of the 7th of *March*, 1857, referred these questions, as well as various questions of account, together with the partnership Books, to two native Assessors or Commissioners; and upon their report of the 15th of *March*, as well as upon his own view of the evidence taken before him, he, by his decree of the 28th of *March*, 1857, determined both the before-mentioned questions in favour of the Plaintiff, and awarded to him, in full satisfaction of his claims up to the date of the decree, the sum of Rs. 1,37,508. 5a., with subsequent interest to the date of realization, and costs. For this amount all the Defendants were made liable.

Against this decree there were four appeals to the *Sudder* Court. Two of them, viz., those of *Mussumat Thookra* and *Sheochurn Doss*, went to the merits of the suit. Of the other two, one was presented by *Sheopershad* as representing the interest of *Moona Loll*, and by the guardian of *Bhugwan Doss*, the infant son of *Gungapershad*; and the other was presented by the sons and representatives of *Rada-*

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kishen. Both of them were confined to the point that the Appellants were improperly made liable for any part of the sum decreed to the Plaintiff; since, upon his mode of taking the accounts, they would be entitled to more than they had received under the partition deed of the 23rd of *February*, 1852.

The *Sudder* Court dealt with the merits of the case upon the appeal of *Sheochurn Doss*. Before doing this, however, and on reading the papers in all the appeals, they made an Order on the 9th of *May*, 1860, whereby they referred the case to two native Commissioners (being the same persons who had acted in that capacity in the Court below) for inquiry and report upon three new points. The first was, what were the profits of the *Mirzapoor* firm during the four years between 1904 *Sumbut* and 1908 *Sumbut*, *i. e.*, between 1848 and 1852. The second involved certain disputed items in the accounts. The third was the amount of maintenance to be allowed to *Mussumat Thookra*, should it be ultimately determined that she was not entitled to a share of the property in dispute.

On the 21st of *May*, 1860, the Commissioners reported that the account of profits rendered by the Plaintiff under the first head of inquiry was incorrect, and begged that either the Plaintiff's Pleaders should be required to furnish a proper account within a given time, or that they (the Commissioners) should be allowed to submit a report on the two other points.

On the 22nd of *May* the Court gave the Plaintiff one week within which he was to file correct accounts. On the 29th of *May* the Commissioners made their report, which was to the effect that for want of proper accounts furnished by the Plaintiff they were unable to report on the profits realized by the *Mirzapoor*

firm; reporting on the disputed items of account; and finding that Rs. 125 *per mensem* was a proper sum to be allowed for the maintenance of *Mussumat Thookra*. On the 4th of *June* the Plaintiff presented a petition to the Court objecting to this report. On the 5th of *June* the Court, after hearing the verbal assertions of the Commissioners and the Pleaders of the parties, passed an Order that the case should be adjourned, the Commissioners dismissed, and the petition of the Plaintiff objecting to the report placed with the record.

By its decree of the 9th of *June*, 1860, the Court disposed of the appeal of *Sheochurn Doss*. They concurred with the Court below in holding that the property in dispute was joint and undivided; that *Mussumat Thookra*, as the widow of one of the co-sharers, was not entitled to take a share in it; and that the Plaintiff had not forfeited his rights as a co-sharer by separating himself from the rest of the family in 1848. They held, however, that *Mussumat Thookra* was entitled to maintenance according to the scale proposed by the Commissioners, and that Rs. 15,000 must be set aside out of the divisible assets to provide for it. They further reduced the divisible assets by the amount of certain bad and irrecoverable debts and other items pursuant to the finding of the Commissioners. And inasmuch as the Plaintiff had failed to account for the profits of the *Mirzapoor* firm between the years 1848 and 1852, they charged him with interest on the principal sum for which he was accountable at 12 per cent. The amount was Rs. 55,280. The effect of this decree was to reduce the sum presently payable to the Plaintiff to Rs. 17,478. 12a. 9p., for which, having regard to the shares taken by him and by the other

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parties under the deeds of 1852 and 1855, they held *Sheochurn Doss* to be solely liable.

Pro formâ Orders giving effect to this decree were passed on the same day upon the other three appeals.

The Plaintiff has appealed against these decrees to Her Majesty in Council. He submits that they should be affirmed in so far as they affirm the decree of the *Zillah* Court, and ought to be set aside, reversed, or varied, in so far as they vary or differ from that decree. The particular relief which he has claimed at the Bar will be more conveniently noticed hereafter.

Sheochurn Doss has presented a cross appeal against the decrees below. He insists that they are unjust and erroneous in so far as they affirm the decree of the *Zillah* Court, and that the Plaintiff's suit ought to have been dismissed with costs. He further submits that, if the decree of the *Sudder* Court against him was substantially right in other respects, it was erroneous in making him solely responsible for the sum decreed to the Plaintiff.

Mussumat Thookra has also presented a cross appeal. Her appeal is not distinguishable from that of *Sheochurn Doss*, except that she does not quarrel with that part of the decree which makes him solely responsible for the amount (if any) payable to the Plaintiff; and on the other hand insists that if the decree impeached was substantially right, positive directions should have been given and provision made for the payment of the maintenance to which she was found entitled.

In dealing with these appeals, we shall first consider whether both the Courts below were right in holding that the property in question was the joint and undivided property of the five brothers; and

in deducing as a consequence from that finding, that the Plaintiff, notwithstanding his acts and conduct in 1848, was in 1852, the date up to which the accounts have been taken, entitled to one-fourth share of it.

The case of the Defendants and cross Appellants upon the first of the points is that the partnership property was in no degree acquired by the use of ancestral property; that *Deenanath* left his native village to seek his fortunes some years after his father's death with nothing but his brass *lotah*, or drinking vessel; that he took service with one *Peeroo Mull*, a native Banker at *Agra*; that whilst in that service he realized a small capital by means of some private adventures; that with the capital so acquired and its accretions he established first the *Agra* and afterwards the other firms; that he associated with himself, from motives of family affection, first *Radhakishen* and *Moona Loll*, and afterwards the other two brothers; employing them in the business rather as dependants than as partners on an equal footing with himself; and that the property of the different firms, if not wholly the separate and self-acquired property of *Deenanath*, was nevertheless partnership property, to be dealt with according to the rules which regulate mercantile partnerships between strangers, and was not subject to the rule of Hindoo law which excludes a widow from the succession to her husband's share of the joint property of an undivided family. If this contention be well founded, the Plaintiff was entitled to at most a fifth share in the partnership assets, and when he brought his suit had received even more than his due in the assets of the *Mirzapoor* firm.

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Before dealing with the evidence upon the question now under consideration, it may be well to notice the arguments of the Attorney-General to the effect that the pleadings of the Plaintiff are in fact inconsistent with the case on which he now relies, and tend to confirm that of the Defendants. To show that the Plaintiff did not sue as one of the co-sharers of a joint and undivided family, but as an ordinary partner, he relied on the phrase "The claim is brought in virtue of right of copartnership" at the commencement of the plaint, and the use of the word "partnership" in other parts of the pleadings; and also on the circumstance that the Plaintiff claimed only one-fourth part of *Deenanath's* share, whereas the Hindoo law of succession, which he was supposed to invoke, would have given him one-half of that share; inasmuch as by that law nephews cannot take by representation in competition with the surviving brothers of a deceased co-sharer.

Assuming the latter proposition to be correct, which their Lordships consider it to be, it may show only that the Plaintiff has to some extent mistaken his rights, and claimed less than he might have claimed. The presumption arising from this misstatement of his rights as co-sharer in an undivided Hindoo estate, is by no means conclusive. It may be outweighed by the proof that the property was in part joint, which the conduct of the family, and the mode in which they kept their accounts, afford. And it may be observed that the claim made is also inconsistent with the hypothesis of a partnership governed by the rules which regulate the rights of mercantile partners as such *inter se*. Nor is it possible to read the whole plaint without seeing that the ground on which the claim to any portion of

Deenanath's share rests is the rule of law which excludes the widow from the succession to a share in a joint and undivided Hindoo estate, and limits her rights to maintenance. Upon the argument founded on the word "copartnership," their Lordships have to observe that the pleadings before them have been translated from those in the native language; that the word is ambiguous; that the phrase "is brought in virtue of right of copartnership" covers the whole claim, which includes the *Huqq Purohittai*, admitted to be ancestral property and no part of the assets of the mercantile firms. Looking to the whole scope of the pleadings, their Lordships have no doubt that the Plaintiff's claim was really based upon his alleged rights as a co-sharer, in a joint and undivided Hindoo estate, and that, as such, it was sufficiently well pleaded.

Upon the facts it must be admitted that the evidence falls far short of proof that the ancestral property contributed in any material degree to the acquisition of the funds employed in trade which formed the bulk of the property in dispute. The family was, however, an undivided family, and there was a nucleus of ancestral property. It may be further admitted that *Deenanath* laid the foundation of the future fortune of the family. But there is no proof that he kept as separate, or treated as separate, property that which he acquired at *Agra*. On the other hand, it is shown that many years before his death he associated his brothers with himself as partners, and that thenceforward they carried on business together each contributing by his exertions to the increase of the common stock. The partition deed of the 23rd of *February*, 1852, itself

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negatives the hypothesis that he employed his brothers as servants or dependants, since under that instrument they share as partners and take an equal share with his widow and assumed representative. There is nothing *primâ facie* improbable in the hypothesis that he brought his earlier gains voluntarily into the common stock, making them the capital on which he and his brothers were to trade. All future gains being made by their joint exertions would, according to the general principle of Hindoo law, be the joint property of the family whilst undivided, and be partible as such on a partition. There is no proof of any special contract (and the proof of such lay on the Defendants) which impressed the character of partnership as distinguished from joint or separate property, in the Hindoo sense of these terms, upon the property in question. In this state of things we have not only the judgments of the two Courts below in favour of the Plaintiff upon this question, but we have also the finding of the two native Assessors to whom it was expressly referred, founded on the pregnant evidence afforded by the Books and accounts of the family. These persons are shown, by later proceedings in the cause, to have had no undue bias in favour of the Plaintiff, and they brought to the examination of the matters referred to them that intimate knowledge of native usages to which a European rarely, if ever, attains. Their Lordships cannot adopt the construction which the Attorney-General would have them put on the Assessors' report of the 15th of *March*, 1857. They believe the first finding in that report to be that the property was joint in the Hindoo sense of the term. And they see no sufficient grounds for dissenting

from that conclusion, or from that to which the Assessors and the Courts below also came, upon the question whether the Plaintiff had effectually separated himself from the rest of the family in 1848.

This being so, the remaining questions for determination, with the exception of one touching the provision for *Mussumat Thookra's* maintenance, are those which arise upon the Plaintiff's appeal, and involve the consideration of the deductions made by the *Sudder* Court from the amount awarded to him by the *Zillah* Court.

That it was right to call upon the Plaintiff to bring into the account the profits made by the *Mirzapoor* firm between the years 1848 and 1852, appears to their Lordships to be too clear for argument. It is, however, insisted that the Court has improperly visited his failure to produce the accounts required, by charging him with interest on the principal sum for which he was accountable at the rate of 12 *per cent.*; that they ought to have given him further time to produce his accounts; and that the cause ought to be sent back to *India*, in order that the account of profits may be now taken. Their Lordships have to observe that the time to be allowed was a matter for the discretion of the Court; that the account was presumably one which the Plaintiff, as a Merchant and Banker, ought to have been able to produce at short notice; that the time actually allowed was not unreasonably short; that in the circumstances it was competent to the Court to charge the Plaintiff with interest in lieu of the profits for which he had failed to account; and that the rate of interest was only that which he himself claimed on the sums due to him. The Defendants are willing to accept the

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interest in lieu of the profit, and their Lordships can see no ground for sending the cause back upon this point at the instance of the Plaintiff. The sum of Rs. 14,316. 2a. 6p., mentioned in the examination of the Commissioners of the 28th of *March*, 1857, was obviously one item of profit appearing in the Books; not the measure of the profits of the *Mirzapoor* firm for the whole of the four years in question. The other items of account which the Plaintiff disputes, and on which he asks to have the cause sent back for further trial, have all been investigated by the native assessors or commissioners. These were persons peculiarly conversant with native accounts; they appear to have been examined on their report in open Court on the 5th of *June*, 1860; and the Judges of the *Sudder* Court expressly state that, after going over the several items with the Commissioners, they entirely concurred in their opinion. To remit a cause to *India*, for the purpose of reopening accounts so taken is obviously a course which their Lordships would not be justified in adopting, unless they had a clear conviction that there had been a miscarriage of justice. They have no such conviction in the present case. It may be true that the Commissioners have not required evidence *dehors* the Books; but the Plaintiff, as a member of the joint family and a partner in the several firms, was *primâ facie* bound by the entries in the books. If he impeached them, it lay on him to falsify them.

Their Lordships do not think that the amount of maintenance decreed to *Mussumat Thookra* is excessive. It is, however, objected by her that positive directions should have been given, and provision made for the payment of her maintenance. And the

Plaintiff, on his side, complains that he is by the decree deprived of his right to claim a share of the principal sum deducted to meet this claim of maintenance on the death of *Mussumat Thookra*.

A Court of Equity in this country, if administering the whole estate, would no doubt have carried over the sum set apart for this purpose to a separate account; would have directed that the annual income should be paid to *Mussumat Thookra* during her life; and that the parties who had a reversionary interest in the principal should be at liberty to apply concerning it on her death. The Country Courts in *India* have, however, no machinery which enables them to take any such course. Nor was the suit one for the general administration of the estate. It was, in form, a suit to obtain present payment of the balance which the Plaintiff alleged to be due to him on the proper division of the property and adjustment of the accounts. The course, therefore, which the Court took was to deduct from the gross amount of divisible assets the sum of Rs. 15,000, which at 10 *per cent.* would produce the annual sum of Rs. 1,500, and to leave it as residue undivided in the hands of *Sheochurn Doss*, in which it was found, subject to the obligation of paying the maintenance. *Sheochurn Doss* and *Mussumat Thookra* being co-Defendants, and there being no proof of the precise terms and conditions on which she had made over to him the share which she took under the deed of the 23rd of *February*, 1852, the Court was hardly in a condition to make more precise provision for the payment of her maintenance by him. Nor is it expedient that their Lordships should now make any Order on that subject. Again, if the *Sudder* Court had simply deducted the

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Rs. 15,000, as so much undivided residue, without saying anything about the Plaintiff's future rights, their Lordships, considering the form of this suit, would have doubted whether he had any grounds for impeaching the decree on this point. The judgment, however, says, "We decide that the best mode of settling her claim will be to deduct from the total divisible assets the sum of Rs. 15,000, the proceeds of which shall be devoted to *Thookra's* maintenance, and in respect to which the Plaintiff is declared to possess no right." These last words are certainly calculated to embarrass the Plaintiff, or his representatives, in asserting the right, which they seem to possess, to claim a share of this sum when the purpose for which it has been deducted from the divisible assets, the maintenance of *Mussumat Thookra*, has been satisfied. Their Lordships, therefore, propose to add to the decree a declaration, that it is to be without prejudice to the right of the Plaintiff, or of his representatives, to claim on the death of *Mussumat Thookra*, such share as he or they may be entitled to in the sum of Rs. 15,000, retained to provide for her maintenance.

Their Lordships, however, do not think that this slight modification of the decree ought to affect the costs of the appeal. And the Order which they will humbly recommend Her Majesty to make is, that the cross appeals of *Sheochurn Doss* and *Mussumat Thookra* be both dismissed with costs; and that, on the appeal of the Plaintiff, the decree in No. 62 be varied by the addition of the declaration above mentioned; that in other respects the decrees appealed against be affirmed; and that the Appellant, *Rampershad*, do pay the costs of his appeal.

JOWALA BUKSH, SON OF MEETA RAM - *Appellant;*

AND

DHARUM SINGH, *alias* IMDAD ULEE KHAN; MUSSUMAT BAJAH KOONWUR AND OTHERS - - } *Respondents.**

On appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

13th & 14th Feb., 1866.

THE suit out of which this appeal arose, was instituted by *Aram Singh, alias Ushruff Ulee*, since deceased, and one of the Respondents, *Kalal Singh*,

It is essential that a Claimant seeking to oust a party in possession of an estate, should establish his own right to the estate,

* Present:—Members of the *Judicial Committee*—The Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

and not rely upon the failure of the title impeached.

A decree of the *Sudder* Court held, that although the title set up by the Plaintiff might be wholly bad, yet that a party Defendant with whom the Plaintiff had by a deed of *Solunamah*, or compromise, agreed to divide the estate, was entitled and on that ground decreed possession. Such decree reversed on appeal, as the effect of the decree would be (1) to defeat the Defendant's possessory title without giving him an opportunity of contesting the title of the party by whom he is turned out of possession, and (2) as it was a violation of legal principles which protect possession, and of justice which regulate the joinder of parties and the union of titles to sue in one suit.

Act, No. XIII. of 1848, is limited to Awards made by Collectors under *Ben.* Regs. VII. of 1822, IX. of 1825, and IX. of 1833, which gives to the Revenue authorities judicial power to determine questions of possession and the right of appeal from such Award is subjected to three years' limitation.

The general rule, that the possession of one member of a joint Hindoo family is the possession of all other members, does not apply where the party claiming has been clearly excluded from the family. In such a case the possession is adverse, and under the general law of limitation the time will run from such adverse possession.

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alias Gholam Ulee, the sons of one *Loll Singh*, caste "*Thakoor Burh Gugar*," a race descended from the *Rajpoot* tribe of Hindoos, on the banks of the *Doab*, who had been converted to Mahomedanism; against the Appellant and *Mussumat Soondur*, widow of *Meeta Ram*, to obtain a declaration of their hereditary right to succeed to the *Taloogna* of *Ourungabad Kaseer*, consisting of eight *Mouzahs* situate in the *Boolundshuhur* District, in the *North-Western* Provinces; and also to cancel and set aside a deed of sale, dated the 17th of *October*, 1842, executed by the late *Thookranee Maha Kooer*, also called *Mussumat Maha Kooer*, the widow of *Tara Singh*, in favour of *Meeta Ram*, the Appellant's father, and to recover mesne profits in respect of the *Taloogna*.

The circumstances which gave rise to the appeal were as follows:—

Roop Singh, alias Pahulwan Ulee Khan, the common ancestor, was *Zemindar* of *Ourungabad*, and died in the year 1753. He had issue three sons, *Lootf Ulee Khan, alias Tara Singh*, *Mokund Singh*, and *Mohun Singh*, who alone had issue a son, named *Loll Singh*. He also died, leaving two sons, the Plaintiff, *Aram Singh*, and *Golol Singh*.

The Appellant's case was, that *Mohun Singh* was the issue of a concubine, and that *Loll Singh* the issue of a female musician, and, consequently, that the descent of *Aram Singh* and *Golol Singh* from *Pahulwan Ulee Khan* was not legitimate.

Whether, a Hindoo family, though converted to Mahomedanism, but conforming for several generations to Hindoo customs and usages, can, by virtue of the retention of Hindoo customs and usages, set up for itself a special and customary law of inheritance. *Quære?*

Abraham v *Abraham* (9 Moore's Ind. App. Cases, 195) distinguished from such a case.

On the death of *Tara Singh* without issue, in 1805, his widow, *Thookranee Maha Kooer*, became proprietress of the *Ourungabad* estate, and also of the *Chukathul* estate, of which *Roop Singh* had been also *Zemindar*, but which estate was not in issue in this appeal, in the room of her husband, with whom a settlement for the Government revenue was made.

In consequence of the Government revenue having fallen into arrear, and *Thookranee Maha Kooer* being in debt to other parties, the estates were in 1811 placed under the Court of Wards, and managers appointed, who remained in possession till the year 1833, when a settlement was made with *Thookranee Maha Kooer*, as sole and absolute proprietor of the estate, for twelve years, from 1833 to 1844 inclusive.

In the year 1842, *Thookranee Maha Kooer* sold the *Ourungabad* estate to *Meeta Ram*, the father of the Appellant, for Rs 30,000, and executed a deed of sale, dated the 17th of *October*, 1842, which was registered on the 24th of *February*, 1843, and the purchaser's name recorded as, *Zemindar*, *Lumbadar*, and *Malguzar*, of the estate.

It appeared that shortly after the execution of the deed of sale, and before the name of *Meeta Ram* was recorded, notices were issued for objections; and as certain objectors appeared (one of whom was *Aram Singh*), the recording of the purchaser's name was postponed in order that inquiries might be made. The objections raised were, in the main, that *Thookranee Maha Kooer* was not of sound mind, and that the sale was fraudulent; the *Thookranee* not having been aware what she was doing. After making inquiries, the Collector declared that *Thookranee Maha Kooer* was of sound mind, and had sold

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the property voluntarily, and that there was no objection to the mutation of names.

In *August*, 1844, *Meeta Ram* died, leaving the Appellant, and a widow, *Mussumat Soondur Kooer*, when objections were for the first time raised by *Thookranee Maha Kooer*, that the estate was under the Court of Wards at the time of the sale, and that the transfer of the property had been procured by fraud. These objections were overruled, and the Appellant's name registered as *Lumbadar*.

Thookranee Maha Kooer died in the year 1853.

On the 14th of *August*, 1854, *Aram Singh* and *Golol Singh*, claiming as heirs and representatives of their father, *Loll Singh*, and grandfather, *Mohun Singh*, brought a suit in the Civil Court of *Meerut*, for possession of the estate of *Ourungabad*, by cancelment of the deed of sale, dated the 17th of October, 1842, alleging, first, that they were co-sharers with *Thookranee Maha Kooer*; and secondly, that the estate had been obtained by fraud without payment of any consideration money, and further, that it was at the time of sale, under the Court of Wards, and for recovery of mesne profits.

The Defendants, the Appellant and *Mussumat Soondur Kooer*, by their answer, denied that the Plaintiffs were ever co-sharers with *Thookranee Maha Kooer*, and alleged that their claim was barred by the Regulation of limitations of suits, and further alleged, that the Plaintiffs were not the legitimate descendants of the common ancestor, *Pahulwan Ulee Khan*; that the estate was not under the Court of Wards at the time of the sale, and that the sale to *Meeta Ram* was genuine.

Afterwards, a supplemental plaint was filed to the

effect: that one *Mussumat Rutta Kooer's* name was registered in regard to the *Chukathul* Estate, as successor of *Thookranee Maha Kooer*, and that as the points in dispute with respect to the *Chukathul* and *Ourungabad* estates were identical, by reason that both estates were the ancestral property of *Pahulwan Ulee Khan*, it was necessary that *Mussumat Rutta Kooer* should be made a Defendant. The Appellant objected to the supplemental plaint, denying that the suits had the same foundation, and stating that there was no necessity for making *Mussumat Rutta Kooer* a Defendant. But she was admitted as a Defendant, and put in her answer.

The principal issues were, first, was the estate in suit the ancestral property of *Pahulwan Ulee Khan*, and were the Plaintiffs his real heirs, and up to the time of the sale did *Loll Singh*, father of Plaintiffs, and *Mohun Singh*, his father, continue in possession, as proprietors along with *Thookranee Maha Kooer*, who was the daughter-in-law of the common ancestor, or not? and at that time did the estate, in consequence of the disqualification of *Thookranee* and the father of the Plaintiffs, come under the Court of Wards, or was it under the sole agency and management of the ancestor of Defendants, and *Meeta Ram*, purchaser? Secondly, was the *Thookranee* at the time of the sale deranged in mind, and was the deed of sale fraudulently altered by collusion of the vendee with the agents of the vendor? And was the payment of Rs. 30,000 consideration money entered, as it stated, and the deed executed on payment of the consideration money, with the consent of the vendor and vendee; and was the estate of *Chukathul*, and its decree of the same form and nature as in this suit, or how? and thirdly, were the

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Plaintiffs on the death of *Thookranee* declared to be her heirs, and after the sale were they prepared to object and to institute a suit?

After taking evidence as to his ancestor being converted to Mahomedanism by force, and the family following Hindoo usages and customs, *Sheikh Monim Ulee Khan*, the Principal *Sudder Ameen* of *Meerut*, by a decree bearing date the 29th of *August*, 1856, dismissed the suit. In the judgment of the Court, the *Sudder Ameen* referred to the suit, No 17 of 1856, to which the Appellant was not a party respecting the estate of *Chukathul*, which had also belonged to *Pahulwan Ulee Khan*, and concluded as follows:—"That suit, by the Orders of the *Sudder* Court, was again brought into this Court, and after investigation this day, in consequence of want of proof of right and dispossession of the Plaintiffs, and their ancestors for a long time, was dismissed, and the Plaintiffs being considered not to be the heirs of *Pahulwan Ulee Khan*, or of *Mussumat Maha Kooer*, deceased, were held to be entire strangers, and not having any concern with the estate; and in their petition, on which an Order was passed on the 27th of *November*, 1855, the Plaintiffs have clearly stated that the nature of the dispute in both suits is identical. Therefore their having no right and possession is proved in this suit also. On this account the genuineness or otherwise of the deed of sale cannot now be inquired into in a suit brought by these Plaintiffs. It is the fault of the Plaintiffs, who although they did not hold possession of the *Chukathul* estate, too hastily making themselves out to be the heirs of the deceased female, set about suing for the cancelment of the sale, and thus burdened themselves with costs also."

The Plaintiffs appealed to the *Sudder Dewanny Adawlut* at *Agra* against this decision, and that Court, by a decree, dated the 24th *December*, 1861, reversed the decision of the Principal *Sudder Ameen*, and decreed, that the Appellant and *Mussumat Soondur Kooer* should be dispossessed, and that the Plaintiffs and the Defendant, *Mussumat Rutta Kooer*, should be put in possession of the estate of *Ourungabad*, agreeably to the stipulations of a certain *Solunamah* or deed of compromise entered into between them, by which they agreed to divide the estate; the matter of mesne profits for the past and future to be settled at the time of execution of decree under s. 197, Act No. VIII. of 1859. In giving judgment, the *Sudder* Court, consisting of Messrs. *Gubbins*, *Lean*, and *Ross*, entered more fully into the merits than the Principal *Sudder Ameen*, and decided that the estate was under the Court of Wards at the time of the sale, and that the deed of the 17th of *October*, 1842, was consequently illegal; that the proof of the receipt of the purchase-money was untrustworthy, and that the deed in question had been procured by fraud, because a certain deed relating to the *Chukathul* estate, and made in favour of one *Nittianund* (to which deed neither the Appellant nor his father, *Meeta Ram*, the purchaser of the *Ourungabad* estate, was a party), had been declared fraudulent. The *Sudder* Court did not deal with the main questions raised in the suit, whether the Plaintiffs or their father ever had any title to the estate as claimed by the Plaintiff, and whether such title was barred by the Regulations of Limitation; but decided the appeal on the ground that, in the opinion of the Court, the sale was not *bonâ fide*, and the suit had

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been commenced by *Aram Singh* within twelve years after the date of the deed of sale. Hence the present appeal.

After the admission of the appeal *Aram Singh* died, when the appeal was revived and his representatives made co-Respondents. *Mussumat Rutta Kooer* did not appear.

Mr. *Rolt*, Q.C., and Mr. *Almaric Rumsey*, for the Appellant; and

Mr. *Leith*, for the Respondents, *Dharum Singh*, and *Mussumat Rajah Koonwur*.

The principal points argued on the appeal were:—

First, upon the question, whether the Hindoo or Mahomedan law governed the succession, after the conversion of the family to Mahomedanism, and the effect of the evidence of the observance of Hindoo usages and customs by the family after being so converted, *Abraham* v. *Abraham* (*a*), and the *Lex loci* Act, No. XXI. of 1850, were referred to.

Second, on the assumption of the Mahomedan law applying, that the *onus* to establish illegitimacy was on the Respondent, *Mahomed Bauker Hoossain Khan* v. *Shurfoon Nissa Begum* (*b*), and that by such law a widow would only be entitled to two-thirds of her husband's estate; *Mussummaut Soobhanee* v. *Bhetun alias Shah Azamally* (*c*), were relied on.

Third, on the other hand, if the case was to be regulated by the Hindoo law, it was insisted by the Respondents that the sale was bad, as a Hindoo widow had only a qualified estate, namely, a right to be

(*a*) 9 Moore's Ind. App. Cases, 198. (*b*) 8 Ibid. 136.
(*c*) 1 Ben. Sud. Dew. Rep. 346.

maintained, without power of sale, *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (*a*); *W. H. Macnaghten's* "Princ. of Hindu Law," Vol. II. p. 211.

Fourth, whether, having regard to the long adverse possession of *Thookranee Maha Kooer*, and to the date of the deed of sale by her to *Meeta Ram*, the suit was not barred (1) by the general Regulations of Limitation of suits after twelve years. *Ben.* Regs. III. of 1793, sec. 14; II. of 1803, sec. 18; II. of 1805, sec. 3, cl. 1, *Maharajah Koonwur Baboo Nitrasur Singh* v. *Baboo Nund Loll Singh* (*b*); *Doorgapershaud Roy Chowdry* v. *Tarapersaud Roy Chowdry* (*c*), were relied upon; (2), as to effect of possession given by the Collector under Reg. VII. of 1822, *Syed Kasim Ali Khan* v. *Bhageeruttee Singh* (*d*); and (3), as to the limitation by lapse of time after Award made by revenue authorities, Act No. XIII. sec. 3 of 1848, was relied on.

The consideration of the case was adjourned, and their Lordships' judgment now pronounced by

18th June, 1866.

The Right Hon. Sir EDWARD V. WILLIAMS.

This is an appeal from a decree of the *Sudder* Court of the *North-Western* Provinces, reversing a decree which the Principal *Sudder Ameen* of *Meerut* had made in the Appellant's favour, by dismissing the suit against him.

That suit was brought by *Aram Singh* (who is since deceased, but is represented on the record by the four first Respondents) and the Respondent,

(*a*) 8 Moore's Ind. App. Cases, 550. (*b*) 8 Ibid. 199.
(*c*) Ibid. 308. (*d*) 1st Augt. 1848, Dec. N. W. Prov. 275.

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Golol Singh, to recover from the Appellant possession of the *Talook* of *Ourungabad Kaseer*, in the district of *Bolundshuhur*, with mesne profits; and to cancel and invalidate a deed of sale of that *Talook*, which was executed on the 17th of *October*, 1842, by *Mussumat Maha Kooer*, wife of *Tara Singh*, in favour of the Appellant's father, *Meeta Ram*.

The Appellant was in possession of the property claimed under the following title:—The *Ourungabad* estate, and also another estate called *Chukathul*, which was situate in the Collectorate of *Allyghur*, formerly belonged to one *Roop Singh*, otherwise called *Pahulwan Ulee Khan*, who died A.D. 1753. He was by extraction a *Gujar*, a race of Hindoos common in the *Doab*, of which Professor *Wilson* says in his Dictionary, "They profess to descend from *Rajpoot* fathers by women of inferior castes." *Roop Singh*, however, became a convert to the Mahomedan faith, and thenceforth adopted the Mussulman *alias* of *Pahulwan Ulee Khan*; and the custom of bearing both a Hindoo and a Mussulman name seems to have been continued in his family. He left a son, *Lootf Ulee Khan*, otherwise *Tara Singh*, who succeeded him in the enjoyment of his property, and died without issue in 1805. He was succeeded by his widow, *Thookranee Maha Kooer*, who became, as the Appellant contends, sole and absolute proprietor of both *Talooks*, and, as such, enjoyed them for many years. In 1842 she sold the *Ourungabad* estate to *Meeta Ram* (the father of the Appellant) for Rs. 30,000, and executed to him the Bill of sale of the 17th of *October*, 1842, which the Plaintiffs in this suit seek to have set aside. This document was registered

on the 23rd of *February*, 1843; and certain proceedings were had before the Collector of *Bolundshuhur*, which resulted in *Meeta Ram* being recorded, in the month of *December*, 1843, in the Books of that Collectorate as "*Zemindar*, *Lumberdar*, and *Malgúzar*" of the whole of this *Talook*, with the exception of one village. *Meeta Ram* died in *August*, 1844, and on an application by his son, the Appellant, for a mutation of names, the *Thookranee* raised some objections to the validity of the deed executed by her. These, after inquiry, were overruled by the Collector, and his decision was confirmed by the Commissioner on the 21st of *February*, 1845. From that time, and at least up to the date of the decree under appeal, the Appellant was the registered proprietor of the *Ourungabad* estate, and in actual possession of it. *Thookranee Maha Kooer* died on the 8th of *September*, 1853; and the suit was instituted on the 14th of *August*, 1854.

The case made by the plaint, in opposition to the Appellant's title, was to this effect:—

The *Ourungabad* and *Chukathul Talooks* were both the ancestral property of *Pahulwan Ulee Khan*, who is termed "the great ancestor" of the Plaintiffs. He had three sons, *Mohun Singh*, *Tara Singh*, and *Mokund Singh*. The two latter died without issue, but *Mohun*, the youngest, left a son, *Loll Singh*, who was the father of the Plaintiffs. The first settlement of the estates after they came, by the conquest of the Provinces in which they lie, under British rule, was made in 1213 *Fuslee* (1806), when the only surviving representatives of the great ancestor were *Loll Singh* and *Thookranee Maha Kooer*, the wife of *Tara Singh*, who, by mutual consent, lived together

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in partnership. A summary settlement was made in 1216 *Fuslee* (A.D. 1809), with the assent of *Loll Singh*, with the *Thookranee*; but in the following year some arrears of revenue having then accrued, another inquiry was made as to the proprietorship of the estates, and both the *Thookranee* and *Loll Singh* having been declared disqualified, both *Talooks* were, by an Order of the 9th of *April*, 1811, placed under the management of the Court of Wards. *Gunga Ram*, the father of *Meeta Ram*, was at one time manager of both *Talooks* under the Court of Wards, and was, in 1825, succeeded by *Meeta Ram*, who was afterwards dismissed for misconduct from the management of *Chukathul*, but continued in that of *Ourungabad*, which had been transferred to the Collectorate of *Bolundshuhur*. The plaint then gives the subsequent history of the *Chukathul* estate. It alleges that *Meeta Ram* caused a document, dated the 21st of *June*, 1840, and purporting to be a deed of sale of that property by *Thookranee Maha Kooer* to his nephew *Nittianund*, for the pretended consideration of Rs. 50,000, to be fabricated; and on the 1st of *March*, 1842, obtained a fraudulent and collusive decree founded on that instrument. It shows that these transactions were afterwards impeached and set aside by a decree of the Civil Court of 26th of *January*, 1849, affirmed by one of the *Sudder* Court of the 19th of *February*, 1851; whereupon "the proprietary right reverted to its former *status*." These decrees proceeded chiefly on the ground that the estate at the date of the alleged sale was under the management of the Court of Wards, and that the disqualified proprietor had, therefore, no power of alienation. The plaint then alleges that the same objections

applied to the sale of the *Ourungabad* estate to *Meeta Ram* in *October*, 1842,, that estate being also under the management of the Court of Wards. It insists that "under these circumstances the deed of sale executed by one unqualified proprietor, notwithstanding the existence of the other heirs of the great ancestor, cannot be held to be legal." It also charges that the transaction was fraudulent, and that not a single portion of the alleged consideration money was ever paid.

The plaint having been filed, the Plaintiffs were met by the difficulty occasioned by a third claim of title. *Thookranee Maha Kooer* had been registered as the sole owner of both the *Chukathul* and *Ourungabad* estates. After the sale of the former to *Nittianund* had been set aside, she had again been recognized by the Revenue authorities as the sole owner of that estate; and when she died the question arose, who was entitled to succeed as her heir. The Collector of *Allyghur* determined this question in favour of the Plaintiffs; but his decision was overruled by the Government, which treating, apparently, the possession of the *Thookranee* as that of a sole and absolute proprietor, and the succession as governed by the Mahomedan law, determined that one *Mussumat Rutta Kooer* was, as her niece, entitled to succeed to her; and accordingly placed or continued the estate under the management of the Court of Wards for the benefit of that lady. The Plaintiffs, or rather *Aram Singh* alone, had brought a suit to contest the title of *Mussumat Rutta Kooer* to the *Chukathul* estate; and feeling that her title as alleged heiress of the *Thookranee* might embarrass them in this suit for the recovery of *Ourungabad*,

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they applied for and obtained leave to file a supplemental plaint, in order to make her a Defendant to this suit also. This supplemental plaint thus stated the title of the Plaintiffs:—"During the lifetime of *Tara Singh*, *Loll Singh*, the Plaintiff's father, was entitled to one half of the ancestral property; and after the death of *Tara Singh*, his wife, *Mussumat Maha Kooer*, was entitled to only one-fourth of the estate; but in consequence of her being the elder relative, her name was registered in the Collector's office by mutual consent, and the said *Thookranee*, and the Plaintiff's father, and after his death, the Plaintiffs lived together in partnership, and appropriated the produce. The registration of the name of one of the members of the family was sufficient for all the members of the family. The principal Plaintiffs being Hindoos of the *Rajpoot* tribe, the Mahomedan Pentateuch is not observed in their family; besides this, they are called by Hindoo names." And again, "The fourth share held by *Thookranee Maha Kooer* in the estate of *Tara Singh*, does not descend by custom to *Mussumat Rutta Kooer*. In accordance with the usage prevailing in their family, and by heritage, the Plaintiffs are the owners of the entire estate."

The defences set up by the answer of the Appellant, and of his mother, who was joined with him as a Defendant, are reducible to the following heads: first, that the *Thookranee* having been in sole possession of the property up to the date of the sale to *Meeta Ram*, to the exclusion of the Plaintiffs and their father, their suit was barred by Regs. II. of 1803, sec. 18, and II. of 1805, sec. 3, the general Regulations of Limitation; secondly, that the claim of *Loll Singh*

and of the Plaintiffs having been rejected by the Revenue authorities in 1838 and 1843, the present suit was barred by Act, No. XIII. of 1848, without reference to the other Regulations of Limitation; thirdly, that the Plaintiffs' grandfather, *Mohun Singh*, and their father, *Loll Singh*, were both illegitimate, the former being the son of a slave girl; the latter, of a female minstrel; fourthly, that *Loll Singh* was never in joint possession and enjoyment of the property with the *Thookranee;* that the revenue settlements were made with her alone; and that she was, in fact, sole proprietor of the estate, and registered as such, not as one of several co-sharers; fifthly, that the *Ourungabad* estate, at the time of the sale to *Meeta Ram*, was no longer under the management of the Court of Wards, and sixthly, that there was no fraud in that transaction, and that the purchase-money was really paid.

There is a good deal of other matter in the answer, but it is more in the nature of evidence pleaded in support of one or other of the above allegations, than of matter raising other and distinct issues.

The replication insisted that the Plaintiffs and their father possessed and enjoyed the property jointly with the *Thookranee;* that the registration in the name of the latter afforded no conclusive presumption against that joint possession; and that these facts were both an answer to the plea of the Regulations of Limitation, and gave the Plaintiffs a present title to the property. It sought to explain the revenue settlements with the *Thookranee* by saying that they were made with her as the elder relative or member of the family. And it met the plea of Act, No. XIII. of 1848, by saying, that the present suit was not brought for re-

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versal of the settlement and Orders under the provisions of Regulations VII. of 1822, IX. of 1825, and IX. of 1833, but for reversal of the sale to *Meeta Ram* within the period of twelve years.

The other pleadings are not of importance. It may be mentioned, however, that those between the Plaintiffs and *Rutta Kooer* raised more distinctly the question, whether the succession to this property from the great ancestor and from the *Thookranee*, was to be governed by the Hindoo or by the Mahomedan law of inheritance; the Plaintiffs insisting on the application of the former.

It has been mentioned that *Aram Singh* had brought a suit against *Mussumat Rutta Kooer* for the recovery of the *Chukathul* estate. The issues raised in that suit were necessarily almost identical with those raised in this suit between the Plaintiffs and *Rutta Kooer*. And in so far as they involved the questions of the legitimacy of the Plaintiffs' father and grandfather, the nature of the interest which *Thookranee Maha Kooer* had in both the *Talooks* in her lifetime, and the heirship to her, they were also similar to the issues to be tried between the Plaintiffs and the Appellant. This being so, the suit for *Talook, Chukathul* was by Order of the *Sudder* Court, transferred from the Civil Court of *Allyghur* to that of the Principal *Sudder Ameen* of *Meerut*, in which the suit for *Ourungabad* was pending. Both causes were heard together, and the evidence, common to both, was taken in both. On the 29th of *August*, 1856, the Principal *Sudder Ameen*, by separate judgments, dismissed both suits. His conclusions upon the issues common to both were stated at length in the judgment in the *Chukathul* case. He found that neither the

father nor the grandfather of the Plaintiffs was legitimate; that neither the Plaintiffs nor their father had been joint in estate with *Thookranee Maha Kooer;* and that, by reason of her long and adverse possession, the claim was barred by lapse of time. He also held that the succession to the *Thookranee* was determinable by the Mahomedan, and not by the Hindoo law, and that accordingly *Mussumat Rutta Kooer* was her heir and representative. And having thus found the Plaintiffs to be the heirs neither of *Pahulwan Ulee Khan,* nor of *Thookranee Maha Kooer,* "but to be entire strangers, not having any concern with the estate," he deemed it unnecessary to inquire into the genuineness or otherwise of the deed of sale of the 17th of *October,* 1842.

Aram Singh and his brother appealed to the *Sudder* Court against both these decisions. Pending these appeals a compromise was entered into between *Aram Singh* and *Golol Singh* on the one part, and *Mussumat Maha Kooer* on the other; the effect of which was that they were to divide the *Chukathul* estate, and the *Ourungabad* estate if it could be recovered, in certain proportions; and a decree was made by consent, in the *Chukathul* suit, on the 5th of *December,* 1861, giving effect to this compromise. The *Sudder* Court, on the 25th of *December,* 1861, heard the appeal in this suit; and on that occasion, after adverting to the compromise, and without coming to any conclusion concerning the Plaintiffs' title, it proceeded to consider whether the deed of the 17th of *October,* 1842, was illegal and without consideration. It determined this question against the Appellant, mainly on the ground that at the date of the deed, *Talook, Ourungabad,* like *Talook, Chukathul,*

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was under the Court of Wards. But it also held that the payment of the consideration was not proved, and that the relation of *Meeta Ram* to the *Thookranee*, and his antecedents, afforded certain presumptions of fraud. It accordingly decreed possession of the property, with mesne profits, to the Plaintiffs and *Mussumat Rutta Kooer*, in the terms of the deed of compromise; meeting the objection made by the Appellant's *Vakeel* that it lay on the Plaintiffs first to prove their title, by referring to the compromise and to the decree passed thereon in the former suit, and by observing that "it would indeed be but an idle and unprofitable prolongation of litigation to dismiss the suit of *Aram Singh* only to enable *Mussumat Rutta Kooer* to sue the Appellant for that which she was willing to share with *Aram Singh*."

Their Lordships are of opinion that this decree of the *Sudder* Court cannot be supported. The Appellant was in possession of the estate. He and his father had held continual possession of it from *December*, 1843, if not from *October*, 1842. His own possession of it had been unquestioned since *February*, 1845, when he was recorded as the proprietor of it. It was essential, therefore, for any party seeking to oust him from that possession to show a better title to the estate, *i.e.*, a title which would give the Claimant a right to the estate failing the title impeached. The judgment of the *Sudder* Court assumes that the title set up by the Plaintiffs may be wholly bad; but it says, if they are not entitled to recover the estate on showing that the Appellant's title is bad, *Mussumat Rutta Kooer* would be so entitled; and as they have agreed to divide the spoils with her, it matters not on which title the property is recovered. The title of *Mussumat*

Rutta Kooer could not be tried between her and the Appellant in this suit. The effect, therefore, of the judgment is to defeat the Appellant's possessory title, without giving him an opportunity of contesting the title of the party by whom he is turned out of possession. Their Lordships cannot give their sanction to this course of proceeding, which appears to them to be in violation of the legal principles which protect possession, as well as of the substantial principles of justice which regulate the joinder of parties and union of titles to sue in one suit. The decision, in effect, sustains an union of titles indirectly, which could not have been directly advanced in union against the Appellant's possession. It is difficult to estimate the full weight of the grave dangers to which so irregular a course might expose possession. They conceive that the first question which the *Sudder* Court ought to have decided, and which must now be decided on this appeal, is, whether the Plaintiffs have shown any title to this property.

In the determination of this question, the first material issue of fact to be considered is, whether, as the Plaintiffs allege, *Loll Singh*, and afterwards the Plaintiffs themselves, were in the possession and enjoyment of the property jointly with *Thookranee Maha Kooer*, or whether her admitted possession was in exclusion of them. Upon the determination of this issue depend not only a material link in the title laid, but also the application of the Law of Limitation to the case, and various presumptions that have an important bearing on the solution of other questions raised in the cause, particularly that of the legitimacy of the Plaintiffs' line of descent.

That the *Thookranee* was in her time the sole

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recorded proprietor of the *Talooks* is incontestable. This, in an ordinary case, might be a circumstance of little moment; because it has been ruled, and is consistent with reason, that one member of a joint Hindoo family may be so recorded on behalf of the family. But in the present case arises the question, why the name in which the property was recorded should be that of the female rather than that of the male member of the family, particularly when, upon the application of the ordinary Hindoo law to the facts as stated by the Plaintiffs, that male member (*Loll Singh*) would, upon his uncle's death, have been entitled to the whole estate, and the female member (the *Thookranee*) would have had only a right to maintenance. It is no satisfactory answer to this question that this was done because the *Thookranee* was the elder member of the family; for it appears on the evidence that she was, in fact, younger in years than *Loll Singh*, and whether young or old, she was equally excluded by the Hindoo law from the inheritance to her husband's share in joint and ancestral property.

This recognition of her, therefore, as apparently sole proprietor, raises a presumption against the case of joint possession and enjoyment set up by the Plaintiffs.

Again, the broad facts deducible from the documentary evidence, so far from rebutting, positively confirm this presumption. The first settlement of both *Talooks* was made after inquiring into the title with the *Thookranee* in 1809. Two years afterwards, the revenue being in arrear, both *Talooks* were placed under the Court of Wards as "the estate of the widow of *Tara Singh*." In the proceeding of the Collector

of the 10th *April*, 1811, by which this was done, there is no mention of *Loll Singh*. The assumption of the estate by the Court of Wards would have been irregular under sec. 4 of Reg. LII. of 1803, if there had been then any co-proprietor not disqualified under sec. 3 of that Regulation. That *Loll Singh* was disqualified, by mental incapacity or otherwise, under that section, or had been declared to be so, there is not the slightest proof. The only foundation for the suggestion that he had been declared disqualified seems to be a loose statement in the Deputy Collector's letter of the 2nd of *March*, 1811, which, assuming *Loll Singh*, to be the heir of the *Thookranee*, says, that he is not qualified (and as such he could not be qualified) to have a settlement made with him.

Again, though *Talook Chukathul* remained under the custody of the Court of Wards, *Talook Ourungabad* was released from that custody some time about the year 1833. In 1833 a new settlement of *Ourungabad* was made with the *Thookranee*. In the Collector's proceedings it is stated that she then claimed the entire *Zemindary*, and asserted that there was no co-sharer of the estate who could call for division. A similar statement appears in the proceedings of the Collector of the 5th of *September*, 1836, which extended the settlement. A further extension of the settlement took place in 1839.

In 1837 we have evidence of his exclusion from *Loll Singh* himself. In *December* of that year, and again in *April*, 1838, he presented petitions to the Collector of *Allyghur*, praying for an investigation of his right as a co-sharer in *Chukathul;* treating the *Thookranee* as in possession, and himself as poor, destitute, and excluded by her. On the 10th of *July*,

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1838, a proceeding was had before the Collector. In this it is distinctly stated that neither the Claimant nor his father, *Mohun Singh*, were ever in possession of the estate. The illegitimacy of the *Loll Singh's* descent was also a point distinctly raised by the *Thookranee* on this occasion. The result was that the claim was dismissed, and *Loll Singh* referred to the Civil Court for the assertion of his alleged rights. In *September*, 1841, he applied to the Principal *Sudder Ameen* for leave to sue *in formâ pauperis* for a moiety of both the *Chukathul* and the *Ourungabad* estates. His right to sue *in formâ pauperis* was contested by the *Thookranee*, who, in her petition to the Court, repeats her objections to his title, as well as the grounds on which she sought to dispauper him. Nothing came of the suit, if it was really instituted, and *Loll Singh* died in 1842.

Again, the proceedings of the Collector of the 9th of *December*, 1843, on the application of *Meeta Ram* to be recorded as purchaser and *Lumberdar* of *Ourungabad*, on which occasion *Aram Singh* and others appeared as objectors, is also inconsistent with the theory that the Plaintiffs were from the time of *Loll Singh's* death to the date of the sale in the possession and enjoyment of the property as co-sharers with the *Thookranee*. On the application for the mutation of names in 1846, they did not even appear as objectors, leaving the contest to the *Thookranee*, who resisted it in the character of sole proprietor.

The petition of *Aram Singh* touching his under-tenure is also consistent with the theory that *Mohun Singh*, *Loll Singh*, and the Plaintiffs were treated as illegitimate relations and dependants of the family. It is inconsistent with the theory that they were ever

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admitted to the rights of co-sharers in a joint ancestral estate. The proceedings also, which resulted in setting aside the sale of *Chukathul*, and are so strongly relied upon for another purpose, are destructive of this part of the Respondents' case. These proceedings were instituted by and with the authority of the Court of Wards, the Collector, on the part of Government, being a party; and the result of them was to replace the Court of Wards in possession of the estate on behalf of the *Thookranee*. Yet, as has been shown above, the possession of the Court of Wards would have been wholly irregular, had *Aram Singh* and his brother then been co-sharers in that estate. The Plaintiffs, therefore, have upon the evidence wholly failed to prove that they or their immediate ancestors were in possession or enjoyment of this property as co-sharers at any time during the tenure of *Thookranee Maha Kooer*, or indeed at any time since the death of "the great ancestor," in 1753.

The Counsel for the Respondents, when pressed by this difficulty, had recourse to a theory that the property was in the nature of an impartible *Raj*, and was, therefore, held by the elder to the exclusion of the junior branch of the family. But, to say nothing of the absence of any evidence of the existence of this supposed tenure, and of its inconsistency with the title set up by *Loll Singh* in 1837, and now pleaded by the Plaintiffs in this suit, it is obvious that though the theory might explain the enjoyment of the property by *Tara Singh* in exclusion of *Mohun Singh*, and afterwards of *Loll Singh*, it would afford no explanation whatever of its enjoyment by *Thookranee Maha Kooer* in exclusion of *Loll Singh* and his sons. For, by the Hindoo law, *Loll Singh*, if

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the legitimate male heir of the great ancestor, would have taken the *Raj* on the death of his uncle, *Tara Singh*, to the exclusion of the widow, the property being assumed to be ancestral, and the family undivided. In the case of *Katama Natchier* v. *The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 539), it was admitted that this would have been the course of descent according to the *Mitacshará*, if the property had been ancestral. The reason why in that case this Committee, overruling the decision of the Court below founded on the opinion of the *Madras* Pundits, preferred the title of the daughter to that of the nephew of the last possessor, was, that the *Shivagunga Raj* was the separate acquisition of the deceased, and, therefore, passed according to the Canon which regulates the descent of separate property, and not according to that which determines the succession to the joint or ancestral property of an undivided family.

The facts relating to the possession of the property having now been determined, it may be convenient next to dispose of the questions arising under the different Regulations of Limitation which were so much debated at the Bar. Their Lordships are of opinion that no ground has been shown for the application to this suit of the statutory bar of three years under Act, No. XIII. of 1848. The operation of that Act is limited to Awards made by the Collectors under the Regulations VII. of 1822, IX. of 1825, and IX. of 1833, which gave to the revenue authorities judicial power to determine certain questions of possession and other matters, with a right of appeal to the regular Courts against their Awards. That right of appeal is by the Act of 1848 subjected to

the three years' limitation. But the order for the mutation of names in the Register in 1843, to which alone it is important to apply the three years' bar, does not seem to be an Award of the same nature with those contemplated by the Act. Nor, in their Lordships' opinion, could the Award of the Collector conclude any of the questions of title, as distinguished from possession, which are raised in this suit. These, therefore, can only be affected by the general law of Limitation. The applicability of that law to the present case depends very much upon the nature of the title on which the Plaintiffs are to be taken to rely. If they are to be taken to sue as the heirs of *Thookranee Maha Kooer*, to set aside a conveyance obtained from her by fraud, their right of action accrued at the date of the conveyance, and their suit was just within even the twelve years' limitation. If they are to be taken to sue as the next heirs of her husband, to set aside a conveyance which, whether fraudulent or not, she, considered as a Hindoo widow, was incompetent to execute, their right of action accrued at the date of her death, and this suit was *à fortiori* within the legal period of twelve years. But, in so far as their title was adverse to that of *Thookranee Maha Kooer*—and it is difficult to treat the title laid as not being of that nature—the facts proved touching her possession show that the claim is obnoxious to the objection that it is barred by lapse of time. The general rule, that the possession of one member of a joint Hindoo family is the possession of all, does not apply where the Claimant has been clearly excluded. In the latter case the possession is adverse, and time will run. The cases of *Muhpal Singh* v. *Gyadutt*, 1854, and *Bunseedhur and*

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another v. *Cheddumnee Loll*, 1852, in the decisions of the *Sudder* Court of *Agra* for those years respectively, are instances of the general rule, and of the exception.

It is unnecessary, however, to invoke the Regulations of Limitation if the Plaintiffs have failed, as their Lordships think they have failed, to establish the legitimacy of either *Mohun Singh* or *Loll Singh*. That is an objection fatal to their title, in whatever character they are taken to sue. It has been seen that the illegitimacy of these persons was alleged by the *Thookranee* certainly as early as 1837. Oral testimony of it, whatever that may be worth, has been given by the Appellant in this suit. The Plaintiffs have given no evidence of the legitimacy of their ancestors. They seem to rest on certain vague statements and admissions in the earlier Revenue proceedings, to the effect that *Loll Singh* was the grandson of the great ancestor, and the heir of the *Thookranee*. The presumption of their illegitimacy is almost irresistible. There is nothing to show why, if they were legitimate, *Mohun Singh*, and, after his death, *Loll Singh*, did not share the property with *Tara Singh*; or why, on *Tara Singh's* death, *Loll Singh* did not succeed to it. On the other hand, the devolution of the property and all the facts proved concerning their exclusion, and the sole possession of the *Thookranee* in succession to her husband, are consistent with the hypothesis that they were legitimate; and, as illegitimate connections of and dependants on the family, received, by means of their under-tenure or otherwise, support and maintenance, and were to a certain extent recognized as relations.

The case has hitherto been treated upon the

assumption, which the Plaintiffs seem to have made part of their case, that this family, though converted to Mahomedanism, is to be taken as still conforming to the Hindoo laws and usages; and that, consequently, the questions of title raised in this cause are to be governed by Hindoo law. Their Lordships, however, are far from admitting the correctness of that assumption.

This case is distinguishable from that of *Abraham* v. *Abraham* (9 Moore's Ind. App. Cases, 195). There the parties were native Christians, not having, as such, any law of inheritance defined by Statute; and in the absence of one, this Committee applied the law by which, as the evidence proved, the particular family intended to be governed. But the written law of *India* has prescribed broadly that in questions of succession and inheritance the Hindoo law is to be applied to Hindoos, and the Mahomedan law to Mahomedans; and in the judgment delivered by Lord *Kingsdown*, in *Abraham* v. *Abraham*, p. 239, it is said that "this rule must be understood to refer to Hindoos and Mahomedans, not by birth merely, but by religion also." The two cases in *W. H. Macnaghten's* "Princ. of Hindu Law," Vol. II. pp. 131, 132, which deal with the case of converts from the Hindoo to the Mahomedan faith, and rule that the heirs according to Hindoo law will take all the property which the deceased had at the time of his conversion, are also authorities for the proposition that the devolution of his subsequently acquired property is to be governed by the Mahomedan law. Here there is nothing to show conclusively when or how the property was acquired by "the great ancestor." There was no

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conflict, as in the cases just referred to, between Hindoos and Mahomedans touching the succession to him. Whatever he had is admitted to have passed to his descendants, of whom all, like himself, were Mahomedans; and it seems to be contrary to principle that, as between them, the succession should be governed by any but Mahomedan law. Whether it is competent for a family converted from the Hindoo to the Mahomedan faith to retain for several generations Hindoo usages and customs, and by virtue of that retention to set up for itself a special and customary law of inheritance, is a question which, so far as their Lordships are aware, has never been decided. It is not absolutely necessary for the determination of this appeal to decide that question in the negative, and their Lordships abstain from doing so. They must, however, observe, that to control the general law, if, indeed, the Mahomedan law admits of such control, much stronger proof of special usage would be required than has been given in this case.

The title advanced by the Respondents, the Plaintiffs in this suit, is that of Hindoo heirs claiming under a Hindoo title, and it is not necessary, therefore, for their Lordships to give any opinion upon the question how the case would have stood if the Plaintiffs' title had been vested upon the Mahomedan law; but as this view of the case was put forward by the Respondents' Counsel, in the course of his argument, their Lordships may observe that it does not seem to them that the Plaintiffs' case would have stood any better under the Mahomedan than under the Hindoo law, for, according to Mahomedan

law, *Mohun Singh*, if legitimate within the wide sense allowed by that law to the term, would have taken an equal share with *Tara Singh* in the inheritance of "the great ancestor," and *Loll Singh*, if legitimate, would have succeeded to his father's share, and would also, on *Tara Singh's* death, have come in as "residuary" for a portion of his uncle's share; and the proved exclusion of *Mohun Singh* and of *Loll Singh* would raise as strong a presumption of their spurious birth as has been already shown to prevail against the Plaintiffs' title, as rested upon the Hindoo law.

The Plaintiffs having thus failed to establish a title to the property, their Lordships do not think it would be right to express a judicial opinion upon the validity of the sale to *Meeta Ram*. They will only observe that the principal ground on which that transaction was impeached by the *Sudder* Court entirely fails; Mr. *Leith* having fairly admitted that on the evidence the *Ourungabad* estate must be taken to have been released by the Court of Wards long before the date of the sale. It may also be doubted whether sufficient weight was given to the proceedings before the Collector in 1843 and 1845. The transaction is not impeached as a purchase obtained by undue influence for inadequate consideration, but as one by which the property was obtained, under colour of a fictitious sale, for no consideration at all. It seems improbable that so gross a fraud should have escaped detection on either of the two local investigations referred to.

Their Lordships' decision, however, is to be taken to proceed wholly on the Plaintiffs' failure to prove a title to the property; and the Order which they will

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humbly recommend Her Majesty to make is, that the appeal be allowed; that the decree of the *Sudder* Court be reversed; that the decree of the *Zillah* Court, dismissing the Plaintiffs' suit, do stand; and that the costs of this appeal be paid by the Respondents.

NAWAB SIDHEE NUZUR ALLY KHAN *Appellant;*

AND

RAJAH OJOODHYARAM KHAN - - *Respondent.**

On appeal from the High Court of Judicature at Fort William, in Bengal.

17th, 19th, & 26th Feb. 1866.

THIS was an appeal from two decrees of the High Court of *Bengal*, bearing date respectively the 1st of *January*, 1863, and the 12th of *January*, 1864, made

A decree of foreclosure made in 1847 by the Supreme Court at *Calcutta* was irregularly obtained. The mortgagees sold the mortgaged estate to *A.*, who, in execution of the decree of foreclosure, which he had also purchased, dispossessed the mortgagor. The mortgagor in 1848 filed a Bill in the Supreme Court to set aside the foreclosure decree, and to redeem the mortgaged estate. *A.* was a party to that suit, but, *pendente lite*, having wilfully suffered the estate to fall into arrears of Government revenue, entered into an agreement with *M.*, whereby it was agreed that *M.* should bid for the estate when sold by auction at a sum less than its actual value. At the Government sale *M.* purchased the estate *Benamee*, and it was subsequently assigned to other alienees, *Benamee*. At the time of the sale to *M.*, the suit for redemption by the mortgagor was pending, and the Court afterwards set aside the decree of foreclosure, and thereby made the estate in the possession of *A.*, under his title from the mortgagees, subject to the equity of redemption of the mortgagor. A plaint in the nature of a

* Present:—Members of the *Judicial Committee*—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor.—The Right Hon. Sir Lawrence Peel.

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by Mr. Justice *Bayley* and Mr. Justice *Campbell*, in a divisional branch of that Court.

The last of these decrees, which was made on a review of the former, affirmed it, with some slight variation, which it is unnecessary to specify. The first decree reversed the decision of the *Zillah* Court of *Midnapore*, made in a suit in which the present Respondent was the sole Plaintiff for redemption and possession brought by him as Mortgagor against the several Defendants, who were, firstly, the representatives of the original Mortgagees, *Aushootosh Deb* and *Promothonauth Deb*, respectively; secondly, the Receiver of the estate of *Promothonauth Deb*; thirdly, the Executors of one *John Compton Abbott*,

supplemental suit was filed in 1860 by the Mortgagor in the Court of the District where the estate was situate, for possession consequent upon redemption, charging generally the whole transaction as between the Mortgagees, the purchaser, and subsequent alienees, to have been collusive and fraudulent. The Defendant denied collusion or fraud, and pleaded in bar: first, the Act, No. I. of 1845, sec. 24, requiring the suit to be brought within one year of the Government sale; secondly, the general law of Limitations, *Ben.* Reg. III. of 1793, sec. 14, the suit not having been brought within twelve years from the time when the cause of action accrued. Held by the Judicial Committee:—

First, that the decree of the Supreme Court, setting aside the foreclosure, placed the possession of *A.* upon the footing of a Mortgagee in possession, and that from that time his title and his possession were in privity with the mortgage title, and no longer constituted such an adverse possession as could be pleaded in bar to the suit, under *Ben.* Reg. III. of 1793, sec. 14.

Second, that as there had been a fraudulent sale, under Act, No. I. of 1845, by *A.*, the Mortgagees' representative in possession, that Act did not apply so as to defeat the Mortgagor's equity of redemption, and that the sale was to be considered as a private sale, and impressed a trust on the estate which passed under it.

Held further, that as there was a fraudulent agreement between the Mortgagees' representative in possession and the purchaser at the Government sale, both were estopped as against the Mortgagor, from relying upon the illegality of their contract.

The effect of a foreclosure decree in the Supreme Court in a mortgage suit between Hindoos is equivalent to a decree establishing proprietary right in the Courts in the *Mofussil* in a similar suit.

By the procedure of the Courts in *India*, the Courts are bound to proceed according to the facts alleged in the plaint, and not to refuse to try issues of fact upon the merits, on the ground of the legal effect of the facts alleged in the plaint.

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deceased; fourthly, one *Alexander M'Arthur;* fifthly, the *Nawab Nazim;* sixthly, the Executrix of a deceased Mahomedan servant of the *Nawab Nazim;* and lastly, the Appellant. The connection of these parties respectively with the redemption suit of the Plaintiff will more particularly appear hereafter.

The decision of the Judge of the *Zillah* Court dismissed the suit of the Plaintiff, the now Respondent, with costs, upon certain objections on points of law which, in the opinion of the Judge of that Court, interposed a bar to the further prosecution of the suit. The Plaintiff was not permitted to go into proof of his case on the merits. From this decision the Plaintiff appealed to the High Court; and that Court, differing in opinion from the Court below on the legal points upon which it had proceeded, reversed the decision and remanded the suit for trial. The present appeal was brought from that decision.

The suit in the *Zillah* Court was brought for redemption and possession consequent on redemption of certain valuable estates, particularly described in the plaint, constituting the Plaintiff's ancestral *Zemindary*. The title asserted was, that of a Mortgagor seeking to redeem, against Mortgagees represented by their representatives in estate, and against subsequent alienees of the *Zemindary* taking subsequently to the Mortgagees, and, as the Plaintiff contended, taking derivatively from them, and subject to his title to redeem.

One of the points was, whether the plaint sufficiently connected the present Appellant, whom it stated to be in possession of the property, with that mortgage title originally in the Mortgagees, the *Debs*, so as to show a *primâ facie* case for including him in this redemption suit.

The suit was stated by the Respondent to be supplemental, in its nature and object, to the one in the Supreme Court for redemption of the same property, brought by the same Plaintiff against the two *Debs* originally, and by amendment against *John Compton Abbott*. It was further urged by the Respondent, that as some of the Defendants against whom relief was asked in this suit, viz., the parties above enumerated after *Alexander M'Arthur*, were not subject to the jurisdiction of the Supreme Court, the Plaintiff had sued in the *Zillah* Court of *Midnapore* by reason of that defect alone.

The Plaintiff, as the eldest son, was the head of a Hindoo family of distinction. A litigation had arisen between him and other members of his family, and to provide funds he had become a borrower from the *Debs*. Their advances were secured by mortgages taken at different times, one of which was stated to have been a *Bengalee* mortgage; the nature of the others did not appear. The Mortgagor and the Mortgagees were Hindoos. The Mortgagees obtained on the 25th *May*, 1847, a decree of foreclosure in the Supreme Court against the Mortgagor. This decree was irregularly obtained, and was subsequently set aside. Whilst this decree for foreclosure was in force, viz., on the 10th of *June*, 1847, the *Debs* sold the *Zemindary* to *John Compton Abbott*. He, after his purchase, in execution of the decree of foreclosure, which he had also purchased, dispossessed the Plaintiff. It did not appear that the Mortgagees had been in possession. The contrary was to be inferred. The possession was first acquired whilst the foreclosure decree was in force, by *Abbott* as owner, and not in privity with the mortgage title.

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The effect of a foreclosure decree in the Supreme Court in a mortgage suit between Hindoos, is equivalent to a decree establishing proprietary right, in the Company's Courts, on similar suits on the like instruments.

On the 2nd of *February*, 1848, the Plaintiff filed his Bill of Complaint on the equity side of the Supreme Court, to set aside this foreclosure decree, and to redeem the *Zemindary*. The Bill was originally filed against the *Debs* only; but on its appearing, by their answer, that they had sold to *Abbott*, he was made a party to the suit. After he was made a party, and on the 15th of *April*, 1848, he entered into an agreement with *M'Arthur*, which agreement was filed with the plaint, in the suit in appeal. This agreement, after reciting that *Abbott* was well seized of or otherwise entitled to the *Zemindary*, that the same was in arrear for revenue, and was advertised for sale of arrears of revenue, proceeded to stipulate as between these two persons, that *M'Arthur* should purchase the *Zemindary* for the sum of three *lacs*, in case the estate did not sell for more at the revenue sale; that he would pay to the Government, if he should be declared the purchaser, the sum for which the estate might be sold; and that he would, within a certain time after he should be declared the purchaser, and have obtained the usual certificate of title, pay to *Abbott* the difference between three *lacs* and the sum for which the estate should have been sold. At this time the suit of the Plaintiff in the Supreme Court for setting aside the foreclosure decree, and for redemption, was pending. The Court, by its decree, dated the 16th of *November*, 1852, set aside the decree of foreclosure, and thereby

made the *Zemindary* in the possession of *Abbott*, under his title from the *Debs*, subject to the right of redemption by the Plaintiff. This right was expressly declared by the judgment in the following passage:—"We think, therefore, that there must be some decree for redemption against *Abbott*, who, if the objections arising upon the form of the record be answered (which objections the Court had overruled), can stand upon no better footing than the *Debs*, whose title he purchased."

The effect of this judgment was to place the possession of *Abbott* upon the footing of that of a Mortgagee in possession, and from that time his above declared title and his possession were in privity with the mortgage title, and no longer constituted an adverse possession. By the reversal of the irregular foreclosure decree, the Mortgagor was restored to his original and legal relation to the mortgage title.

After *Abbott* had been made a party to the redemption suit, *Promothonauth Deb*, one of the Defendants, died, and the suit was revived, and other parties were made Defendants by a Bill of revivor and supplement. The personal representatives of *Promothonauth Deb* were made parties, together with *M'Arthur* and one *George Lindsay Young*, and the *Nawab Nazim* and the representatives of *Sauduck Ally Khan*, out of the jurisdiction of the Court, were also named as Defendants. These parties were stated to have been introduced as Defendants in consequence of some discovery which had been obtained by the answers previously put in. The agreement, however, between *Abbott* and *M'Arthur* previously mentioned, of the 15th of *April*, 1848, was then unknown to the Plaintiff, and the new Defendants

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were made parties upon allegations that at the sale for the arrears of revenue referred to in the agreement, *M'Arthur* had purchased *Benamee* for *Abbott* and the *Debs*, and that they had sold to *Sauduck Ally Khan*, who had purchased *Benamee* for the *Nawab Nazim*. It would swell the narrative of the facts of the case which preceded the present suit to an unnecessary length, if the precedent litigation were followed minutely through all its stages. It will suffice to state that *Sauduck Ally Khan* and the *Nawab Nazim* did not appear to the Bill, and that, upon *M'Arthur's* answer coming in, and it appearing by it that he had conveyed to *Sauduck Ally Khan*, *Benamee*, for the *Nawab Nazim*, he was dismissed from the suit, and a decree for redemption was made against the other parties who had appeared in the suit. This decree bore date the 16th of *November*, 1852.

That decree, together with the agreement of the 15th of *April*, 1848, and another document, were annexed by the Plaintiff to his plaint in the suit under appeal. The decree declared that the "Plaintiff, as between himself and the Defendant in those suits, was entitled to redeem the mortgaged premises in the Bill mentioned, notwithstanding the said final foreclosure Order." The title to redeem was declared as to all the mortgaged premises, and not simply as to those which could be recovered in that suit, though the decree bound those only who were parties to the suit at the time when it was pronounced, and at that time *M'Arthur* had ceased to be a party to the suit. In a subsequent part of the decree it was ordered "that the Master should inquire and state to the Court what portions of the mortgaged premises had been sold since the same came into the

possession of *John Compton Abbott* for arrears of Government revenue, or otherwise, and to whom the same respectively had been sold; and if he should find that any had been so sold, he was to take an account of all moneys which had been received by or come into the hands of the Defendant, *John Compton Abbott*, or any person or persons by his Order or for his use in respect of the purchase money arising from such sales, or of the surplus proceeds of such Government sales, if any, or which, but for his or their wilful default, might have been received." This portion of the decree furnished one of the grounds on which the Judge of the *Zillah* Court proceeded in his dismissal of the Plaintiff's suit.

The decree also directed certain inquiries in the Master's office; and in the due prosecution of those inquiries, *M'Arthur* was subsequently, on the 17th of *August*, 1854, examined before the Master. This examination first disclosed to the Plaintiff the existence and contents of the agreement between *M'Arthur* and *Abbott* of the 15th of *April*, 1848. *M'Arthur's* examination further disclosed that there was an agreement between him and *Abbott*, that the latter should suffer the revenue to fall into arrear, in order that the estate might be sold for arrears of revenue; and further, that he, *Abbott*, should not bid for the estate. *M'Arthur* explained that his reason for wishing *Abbott* not to bid was to prevent its going above the three *lacs*.

This discovery led to the institution of the present suit. The plaint in this suit was filed on the 30th of *May*, 1860. In the plaint it was stated that possession was given to *M'Arthur* under the certificate of title, consequent on the sale for arrears of revenue, on the 1st of *June*, 1848. The plaint was for posses-

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sion consequent upon redemption. The relation to this suit of the several parties who are above mentioned to have been made Defendants to it, sufficiently appears by what has been already stated, except that the Defendant, *Sidhee Nuzur Ally Khan*, the Appellant, was described as in possession, collusively with the *Nawab Nazim*. The Plaintiff in his plaint alleged, with respect to all the parties whose interests arose upon and after the sale for arrears of revenue, that is from the *Nawab Nazim* inclusively down to and including the present Appellant, that they took fraudulently and collusively. It was objected for the Appellant, that the plaint did not connect him with that charge of fraud and collusion, but the following words in the plaint, viz.: "the collusive, fraudulent, and fictitious auction sale like a private sale," evidently referred to that sale which the Plaintiff treated as the fraudulently interposed bar to his redemption, viz., that at which *M'Arthur* was declared the purchaser; for in a subsequent part of the plaint that sale and the agreement between *M'Arthur* and *Abbott*, of the 15th of *April*, 1848, were referred, to and the words, "and the subsequent transfers," following on the words "the collusive, fraudulent, and fictitious auction sale like a private sale," plainly meant, as the sense imports, all those transfers between the parties whom the Plaintiff made, in person or by representation, Defendants, by derivation of title from the *Nawab Nazim*, and the words, "being declared collusive," importèd that the Plaintiff ought by his suit to have them so declared. The repetition of the words "private sale," and the more formal conclusion, viz., "As the said sale took place in the mode described above, so it cannot be viewed in the light of a sale for arrears

of revenue, but is to be treated as a private one," clearly marked on what legal ground, whether sound or unsound, the Plaintiff meant to found his title to redeem as against those of the Defendants whom his former decree in the Supreme Court did not reach. Their Lordships, therefore, were of opinion that there was sufficient allegation in the plaint to connect the Appellant with the charge of fraud and collusion.

The Plaintiff swore to the truth of his plaint. The answers of the Defendants were taken. That of the Appellant, in the second and third articles, relied on the pendency of the suit in the Supreme Court, and on the Plaintiff's right not being established there. In the fourth article he relied on the special law of Limitation, sec. 24, Act, No. I. of 1845, and insisted that as the suit was not brought within one year, the sale could not be set aside. In the sixth he relied on the general Law of Limitation, sec. 14, *Ben.* Reg. III. of 1793. In the seventh he denied collusion. The answer of the *Nawab Nazim* raised the same questions on the law of limitation of suits. He objected further, in his third article, that the Government should have been made a Defendant, the suit being to set aside the revenue sale. He denied the charges of fraud and collusion, and insisted that if the Plaintiff had been wronged he had his claim for damages against *Abbott* and others.

The Plaintiff's *Vakeel* was examined by the Court as to the meaning of the plaint and the nature of the fraud charged. That examination did not carry the matter further than the plaint itself.

The first and second issues were on the law of Limitation, as above stated. The third related to the Government not being a party, the suit being to

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reverse the sale. The fourth was on the effect of the pendency of the suit in the Supreme Court. The fifth related to the form of the plaint.

The *Zillah* Judge decided against the Plaintiff on the first, second, third, fourth, and fifth issues; the defect of form to which the fifth issue related, he declared to be amendable; but as he considered the suit to be barred on the other grounds of the limitation law, and the nature of the decree in the Supreme Court, he made no amendment.

The High Court, on appeal, decided that the suit was not brought to set aside the revenue sale; that it was not barred by effluxion of time; that the pendency of the suit in the Supreme Court, at the time of the institution of the above suit (afterwards in the High Court, which had been substituted for the Supreme Court), and the decree given in that suit, were no bar to the prosecution of the claim.

The Court further considered that *M'Arthur* and *Abbott* could not allege their own wrong, and that a trust might be fixed on the estate of *M'Arthur* in favour of the Appellant without disturbing the Government sale; and with this declaration of the law they remanded the cause for trial. The present appeal was brought from this decree (*a*).

The Attorney-General v. (Sir *R. Palmer*, Q.C.), and Mr. *A. K. Stephenson*, for the Appellant, and

Mr. *Rolt*, Q.C., and Mr. *Leith*, for the Respondent.

It was argued:—

First, upon the pleadings (1) that the plaint con-

(*a*) See case, *ante*, p. 322, on the application to stay proceedings in the Court below, pending the appeal to England.

tained no distinct charge of fraud against the Appellant or the other Defendants, and was, therefore, bad, under *Ben.* Reg. II. of 1805, sec. 3, and Act, No. VIII. of 1859, sec. 26; and (2) that he could not be called upon to defend his title and possession on any general allegation of fraud as contained in the plaint, so as to connect him with the Mortgagees, the *Debs*, and entitle the Respondent to make him a party to the redemption suit.

Second, as to the operation of the Regulations of Limitations as a bar to the suit, that (1), if the statement in the plaint was correct, that the Respondent was dispossessed from the 3rd of *October* to the 5th of *November* 1847; and if that was to be taken as the date of the accruing of the cause of action, more than twelve years had elapsed, or (2) if the cause of action accrued on the 30th of *May*, 1848, when the certificate of sale was granted to the Defendant, *M'Arthur*, as the auction purchaser of the Respondent's property, twelve years had equally elapsed, and, therefore, that the suit was barred by *Ben.* Reg. III. of 1793, sec. 14, *Rajah Enayet Hossien* v. *Sayud Ahmad Reza* (*a*) was referred to on this point.

Third, it was insisted that on the correct interpretation of the provisions of Act, No. I. of 1845, relating to sales by auction for arrears of revenue, that Act was intended, not only for protection of the revenue, but to give security to titles to purchasers at such auctions; and to protect the holder of a title obtained at such auction, or his assignee, from having their titles questioned in a Court of Justice, except under the circumstances mentioned in the 24th section, or, that, at all events, the Mortgagor was bound to make good

(*a*) 7 Moore's Ind. App. Cases, 238.

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to the purchaser, a stranger, the purchase money *Hope* v. *Liddell* (*a*), *Rorke* v. *Errington* (*b*), *Power* v. *Reeves* (*c*), *North* v. *Ansell* (*d*), *The Bishop of Winchester* v. *Paine* (*e*).

Fourth, that even if there was fraud on the Mortgagor committed by *Abbott* and *M'Arthur*, in procuring a sale by auction for arrears of revenue designedly incurred, and that the sale was a secret sale, the remedy was, under Act, No. I. of 1845, by a personal action for damages, and not for the relief sought by the plaint.

17th March, 1866.

Judgment was reserved, and now delivered by

The Right Hon. Sir EDWARD V. WILLIAMS.

After stating the above facts, his Lordship proceeded as follows:—

Before entering upon the particular questions raised by this appeal, it may be right to observe, that the Courts in *India*, in disposing of the case, were bound to proceed, as the High Court appears to have proceeded, upon the facts alleged by the plaint, and upon the assumption of the truth of those facts. When a Plaintiff, on certain alleged facts, asks relief, and is unable to obtain a trial of the facts, and a hearing on the facts that he may establish, by reason of the conclusions of law which the Judge forms on the case in its then condition, justice requires that the Court should proceed upon the Plaintiff's allegations. The case must be determined as if it had arisen on a demurrer to a pleading or to evidence where such

(*a*) 21 Beav. 183.
(*b*) 7 H. L. Cases, 617.
(*c*) 10 H. L. Cases, 645.
(*d*) 2 P. Will. 618.
(*e*) 11 Ves. 104.

procedure exists. Courts cannot be justified in refusing to allow cases to go to proof upon any other assumption than that the facts alleged are capable of proof, and are proved. This assumption of the truth of the facts alleged must, however, be limited to the consideration of the legal effect of the facts alleged upon the bars raised against the trial of those facts, and their Lordships, therefore, abstain from expressing any opinion upon the points urged at the Bar, which do not arise out of the Plaintiff's pleadings and documentary proofs, or which, if they arise, are not necessary to the decision of this appeal. Observations were made by Mr. *Leith* upon the omissions in, and nature of, the answers put in by the Defendants to the Respondent's plaint; but their Lordships, for the above reasons, do not think it right to refer to those observations. The answers can only be looked at for the purpose of ascertaining whether they raise the legal bars insisted on. Throughout the following observations their Lordships must be understood to proceed upon a hypothetical case of fraud, and to express no opinion on its truth or probability.

The first bar to the Plaintiff's claim set up by the Appellant was that of limitation of suit by effluxion of time. The first period of limitation insisted on by the Appellant was that under Act, No. I. of 1845, sec. 24. That objection necessarily supposed the suit to be brought to set aside the revenue sale; this remedy, however, the suit did not seek, but, relying on the agreement of the 15th of *April*, 1848, antecedent to the sale, the Plaintiff claimed a right, as it were, to confess and avoid that sale, by imposing a trust on the estate which passed under it. The question, therefore, as to this period of limitation is, whe-

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ther the Plaintiff is well founded in claiming the right thus claimed by him, in effect whether the Plaintiff can treat the auction sale, as against those Defendants who rely on it, as a private sale. Before dealing with this point, however, it will be convenient to consider the other period of limitation on which the Appellant relies as a bar, the general law of limitation of twelve years. As to this, it is sufficient to observe that on the allegations in the plaint that bar cannot be set up; for the title and possession of the Defendants against whom the redemption is prayed by this suit, is expressly alleged to be founded on fraud. This period of limitation, therefore, may be laid out of the case; and we come then to what has appeared to their Lordships to be the real question in the case (the question to which we have above referred), whether the Plaintiff can, in point of law, insist, notwithstanding the auction sale for arrears of revenue, that as against him, that sale ought to be viewed as a private sale. The title to redeem in this suit as against the parties subsequent to *Abbott* is rested on that ground, and the case which the Plaintiff alleges by his plaint, and by the documentary proof appended to it, is one of fraud between *Abbott* and *M'Arthur*, to deprive him of his title to redeem the *Zemindary*, by means of a secret purchase of it between them for three *lacs* of Rupees, including a fraudulent device of a sale by auction for arrears of revenue, such arrears to be designedly incurred. By that agreement *Abbott* would become directly interested that the estate should sell for a low price, since the proceeds would be subject to the Mortgagors' claim, and the lower the price obtained at the auction sale, the larger the share would be which *Abbott*

would take of the three *lacs*. Parties to a secret fraud intend it to be secret, and the price realized at the auction sale would alone be known. These facts and conclusions are directly taken and derived from the plaint, and the agreement of the 15th *April* annexed to it, and from *M'Arthur's* examination before the Supreme Court, which are all parts of the Plaintiff's proofs.

If these facts cannot be displaced, the agreement was undoubtedly a gross fraud on the Mortgagor, committed by both the actors in it, viz., *Abbott* and *M'Arthur*. But it was argued that even if this case were true, the remedy under the Act I. of 1845 was for damages only. This argument was in conformity to the opinion of the *Zillah* Judge. But it is to be observed that this argument assumes the very question under discussion, which is, whether the Act extends to the present case. Mr. Justice *Bayley* thought that the Act was not designed to protect a fraudulent purchaser. He put his decision on the ground that a man is not allowed by law to take advantage of his own wrong; and he treated the case of such a purchaser as beyond the protection intended to be given by the Act to purchasers under an auction sale.

No authority founded on the decisions of the late Company's Courts was referred to by the Judges of the High Court, and none such has been quoted before their Lordships on the argument of this appeal. The case is, however, not altogether new in *India*. The question was considered in the decision of the Supreme Court in the cause so often referred to, to which this suit is alleged to be supplemental. Mr. Justice *Colvile*, in that judgment, whilst he declares a Government sale for arrears of revenue to give a title against all the world, with certain excep-

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tions, engrafts on that general rule this exception, that a fraudulent purchase at such auction sale by a Mortgagee will not defeat the equity of redemption. The subject is treated in Mr. *Arthur Macpherson's* Book on Mortgages, at p. 91, who there quotes a prior decision, *Kelsall* v. *Freeman*, of the Supreme Court to the same effect. The author, now a Judge of the High Court at *Calcutta*, expresses a similar opinion, and as his Book is one well known and frequently consulted in *India*, the decision under review cannot be regarded as unsettling a previously settled state of the law, and as raising for the first time an exception to the general protection which this legislative title affords to purchasers. In support of this view we may refer to other authorities. In the celebrated opinion of C. J. *De Grey* in the House of Lords, in *The Duchess of Kingston's case* (*a*), he says, "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that they were misled." "Fraud," his Lordship proceeds to state, "is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord *Coke* says, it avoids all judicial acts, Ecclesiastical or Temporal." The Chief Justice then proceeds to state that fines and recoveries may be avoided for covin by strangers, and gives other illustrations of the same principle. The case of *Collins* v. *Blantern* (2 Wils. 341) is an authority

(*a*) Howell's State Trials, Vol. 20, p. 544.

to show, if any were needed, that a Court will strip off all disguises from a case of fraud, and look at the transaction as it really is. In addition to these authorities, it may be observed that the principle embodying this distinction pervades the law. Under sales in market overt, the purchaser acquired a title against all the world; but this protection did not extend to a fraudulent buyer who knew that the seller had no real authority to sell. If the thief who sold in market overt repurchased the article, the defrauded owner could then assert his title against such reacquisition. See *Viner's* Abr. tit. "Market Overt," A 1. In *Bacon's* Abr. tit. "Fraud," p. 768 (*Gwillim* & *Dodd's* edition), it is said, "If goods are sold in market overt by covin between two, on purpose to bar him that has right, this shall not bar him thereof. 2 Inst. 713, *Cro. Eliz.* 86." The same principle applies to Bills of Exchange and other negotiable instruments, made or which become payable to bearer, and pass by delivery.

Again, a title by estoppel is a well-known title. The doctrine that a man cannot take advantage of his own wrong, as used and applied by Mr. Justice *Bayley* to this title to redeem, is a correct application of that doctrine, if the facts support him. Assuming, as we must, the agreement to be proved, was this sale, as between *Abbott* and *M'Arthur*, really meant to be a sale under the Revenue laws for arrears of revenue, or was it a device—part of the machinery, as it were—to effect a fraud? Under a private conveyance, in the state of the title and of these parties, the estate, if conveyed by *Abbott* to *M'Arthur*, would have been redeemable by the Plaintiff. If the sale were intended to have been a real sale under the Re-

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venue laws, what would have been *Abbott's* interest? His estate would have been extinguished, and all that he would have been entitled to would have been a Mortgagee's interest in the surplus of the money realized by the sale over the arrears. Would a real vendor seek to reduce that surplus? The price was a fixed sum of three *lacs*; the parties contemplated a sale under that sum by the auction proceeding; and it may be well to repeat that it was *Abbott's* interest to cause, as far as he could cause it, that the auction price should be low, since, though the auction sale was public, his agreement was not known to the Mortgagor. What, then, if the sale were to be real, could be the consideration which *M'Arthur* was to receive for the excess of the three *lacs* over the auction price? The estate would have passed to him for the lesser sum. This suffices to show that, as between them, the sale was meant to be under the terms of the agreement in the case that has happened, which was a case contemplated by *Abbott* at least. These parties, therefore, are estopped or precluded by their acts from setting up, as against a third person, the Mortgagor, the object of their fraud, and a stranger to the agreement, the illegality of the agreement itself. The Plaintiff is entitled to say, this agreement is the real contract. Two cases decided by the House of Lords upon the effect of the Sale of Encumbered Estates Act for *Ireland, Rorke* v. *Errington* (7 H. L. Cases, 617), and *Power* v. *Reeves* (10 H. L. Cases, 645), were referred to by the Appellant's Counsel, in support of the Appellant's case, but it is sufficient to say that these were not cases of a fraudulent use of the provisions of an Act of Parliament for effecting a fraudulent purpose. They do

not appear to their Lordships in any way to affect the present case.

The various questions that have been put in the course of the argument, of notice, of knowledge, of purchase by an innocent principal through a fraudulent agent, need not here be answered. They do not arise on the facts before us. Those facts may not be the real facts. Any opinion expressed upon these points would be not merely an *obiter dictum*, it would be by anticipation an opinion hazarded on supposed facts, and evidence, if the cause be still untried, might be made to fit them.

This decision proceeds entirely upon the ground that, as between these parties, the sale must now be considered as a private sale. The decision has no application to interests derived under a real auction sale. The opinion of their Lordships upon this point disposes of the first bar of limitation by effluxion of time under Act, No. I. of 1845.

The questions remaining for consideration are, whether the pendency of the suit in the Supreme Court, or the nature of the decree, or any acting under that decree, present a bar to the prosecution of the suit, which the decree under appeal has remanded for trial on the facts. The mere pendency of the suit cannot operate as a bar, since the suit in the *Zillah* Court was intended to be simply in furtherance of and supplemental to it. The nature of the decree requires more consideration. Had that decree been one which could not have been modified or varied by further proceedings in the Supreme Court itself, in the nature of a supplemental suit on the new matter discovered since the decree, the objection might have been tenable; but the law of the Court is otherwise.

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Had the *Nawab* and the parties Defendants subsequent to him been subject to the jurisdiction of the Supreme Court, the relief which is now sought to be obtained against them in the *Zillah* Court might have been prosecuted by a further suit, in the nature of a supplemental suit, properly constituted in the Supreme Court. The decree, as to the account and the inquiries directed as to alienated lands, might upon the new facts have been varied there, and the same relief may be obtained in this suit. The Defendant in possession is charged in substance as assignee of the mortgage, and in that character redemption is prayed against him. The relief is subject to the same conditions and equities which would have attached to it in the Supreme Court.

It would be unjust to exclude the relief by reason of mere personal exemption from the jurisdiction of the Supreme Court. To rely on this bar would be to plead an impediment against a suit instituted to remove it. The direction to inquire as to the alienated lands, and the relief consequent on that inquiry, are introduced for the benefit of the Mortgagor, in case the pledge should turn out to be irrecoverable through the fault of the pledgee. Such relief in this case is in the nature of compensation for a wrong. If it be subsequently discovered that the pledge can be restored or recovered, the Mortgagor may waive that benefit, and prosecute his right as to the thing itself. Lastly, with reference to the dealing under the decree, it is to be observed, that the mere prosecution of an inquiry, especially under a mistaken impression, would not raise a case of election, or amount to a waiver of a tort. This is all that the facts alleged disclose. They disclose

that, at the time of the decree, the estate was supposed to be irrecoverable, and that the Court, in directing the inquiries which it directed, acted on that impression. They do not disclose what has been done in the way of satisfaction under the decree. The case alleged in this suit is one of fraudulent misdealing with the property pledged. The case of *Hope* v. *Liddell* (21 Beav. 183), quoted by the Attorney-General, was not a case of fraud. The observations of Lord *St. Leonards*, quoted by the Master of the Rolls, relate to a *bonâ fide* purchaser for value, and to the proper mode of working out his equity against that of a Plaintiff whose property has been alienated by mistake.

The facts in the case of *Hope* v. *Liddell* differ widely from the alleged facts in the case under appeal; and the grounds on which that decision proceeded do not exist in this case, as it now appears. In the case of *Hope* v. *Liddell*, the original Testator, Dr. *Spencer*, devised the lands in dispute to one *Thompson*, a Trustee, on certain trusts. *Thompson* devised all his estates by general words, to his sister, *Grace Thompson*. This devise was erroneously supposed to pass the trust estate, which really went by descent to the heir-at-law of the Trustee. One of the *cestui que trusts* contracted to sell the estate to the Defendant, *Liddell*. The sale was perfectly *bonâ fide* on both sides. The price was adequate, and was paid. It was paid by the purchaser into the hand of the *cestui que trusts* by the direction of the supposed Trustee, *Grace Thompson*. The purchaser was by the trust deed not required to see to the application of the purchase money. The Court said, that if *Grace*

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Thompson had really been the devisee in trust, as she was supposed by all to be, the transaction could not have been impeached. The defect was the want of the legal estate. On the second question in the cause, the Court found that the children, the objects of the trust, had, with full knowledge of all the circumstances and of their rights, taken the purchase money in lieu of the land. In this case, however, at the time of the decree in the Supreme Court, it was supposed that the land was gone irredeemably. In that state of belief there could have been no matters between which to choose. Afterwards, when it was discovered that the auction sale had been contrived under the agreement of the 15th of *April*, 1848, a new state of facts appeared. The matters between which to elect would then have been the land, and the full price the three *lacs*, not simply the auction price. Nothing appears further on the alleged facts, except that the inquiry before the Master went on; but that it might well do, subject to final correction and due adjustment. There is no ground, therefore, for applying the decision of *Hope* v. *Liddell* as an authority to govern this case in the present state of the facts.

The same cause which has induced their Lordships to refrain, in the earlier part of this judgment, from expressing an opinion upon the law applicable to an unascertained state of facts, operates also here to induce reserve. Distinctions may exist between claims of this nature, founded on actual fraud by a combination between several wrong-doers, all liable to make satisfaction up to one, complete satisfaction for the injury done, between whom there may be, *inter se*, no right to contribution, and remedies founded on

contract, or converted by the choice of the sufferer into claims *ex contractu;* but, for the reasons already given, this subject cannot now be pursued further. Their Lordships will humbly recommend to Her Majesty that this appeal be dismissed with costs.

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MUDHUN MOHUN DOSS, agent of the firm of DWARKA DOSS and MUDHOBUN DOSS - - - } *Appellant;*

AND

GOKUL DOSS - - - - - *Respondent.**

On appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

27th Feb. & 1st March, 1866.

THE facts of the case are fully stated in the judgment.

The suit was brought for a wrongful distress, and

In an action of *tort*, the Plaintiff is not precluded from recovering ordinary damages by reason of his failing to prove the special damage laid, unless the special damage is the gist of the action.

Though a Plaintiff after a wrongful distress may have received permission to use his own property, he is neither bound to accept the permission so accorded to him, nor if he does accept it, will he lose his right of action. In such case he is entitled, at least, to a judgment for nominal damages.

On appeal, the appellate Court was of opinion, that there was evidence from which the Court below ought to have awarded damages in respect of losses sustained by an illegal attachment. As the whole evidence was before the appellate Court, it was held that there was no necessity to remit the case to *India* for re-trial, and the Judicial Committee accordingly assessed the damages from the materials before them.

The Plaintiff claimed as damages a larger sum than the appellate Court awarded. No costs were given on the appeal. Held, following the practice of the Courts in *India*, that as the Plaintiff recovered a less amount than he laid in his plaint, his costs in the Court below were to be apportioned to the amount recovered, and not to the sum claimed.

* Present: Members of the *Judicial Committee*,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

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the question was, whether the Appellant was entitled to any, and what amount of damages for loss of or damage to certain indigo cakes and stumps in a Factory belonging to *Dwarka Doss*, for whom the Appellant acted as Agent, in consequence of the illegal execution of a warrant of attachment, issued by the Respondent, under a decree in a suit brought against third parties; which warrant was subsequently by an Order of the *Zillah* Court of *Mirzapore*, set aside, and the attachment withdrawn.

The suit was instituted in the Civil Court of *Mirzapore*, and the *Sudder Ameen* of that Court (*Moulvi Khoorshyd Ali Khan*), by his judgment, dismissed the suit, on the ground that the claim of the Appellant on account of the damage of the indigo plants and stumps was unfounded; that with respect to the indigo cakes, that though it was probable that some trifling loss was sustained owing to the warehouse being locked up, yet that the loss was occasioned by the Appellant resisting the attachment; and further, that eight *maunds* of indigo had not been attached. The *Sudder* Court at *Agra* (present, Messrs. *E. W. Wylly* and *J. Lean*) affirmed that judgment. Hence this appeal.

The appeal was argued by

The Attorney-General (Sir *R. Palmer*, Q.C.) and Mr. *Leith*, for the Appellant; and

Mr. *Forsyth*, Q.C., and Mr. *Pontifex*, for the Respondent.

For the Appellant it was insisted, that the attachment and seizure were illegal, and had been on that ground withdrawn by a Court of competent authority; that the amount, therefore, claimed as damages, or at

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least some damages, ought to have been awarded by the Court, first, for the deterioration of the manufactured articles; second, for loss of profits by reason of locking up the warehouse; and third, for the loss of materials, independently of any proof of special damages thereby sustained, *Bayliss* v. *Fisher* (*a*), and that such rule is adopted by the Courts in *India, Manir Ud Din* v. *Jai Sankar Sandial* (*b*), *Munneeooddeen Darogah* v. *Hurree Pershad Mundul* (*c*); *Mussumat Sidhisree Debea* v. *Wise* (*d*).

On the other hand, the Respondent denied that any damages had been sustained by the Appellant by the attachment and seizure, or if there had been any, that it was confined to the eight *maunds* of indigo.

17th March, 1866.

Their Lordships' judgment having been reserved, was now pronounced by

Sir JAMES W. COLVILE.

This suit was brought to recover the damages alleged to have been sustained by the nominal Plaintiff's employer, *Dwarka Doss*, in consequence of an attachment made at the instance of the Respondent as the holder of a decree.

Dwarka Doss and the Respondent had conflicting claims upon an indigo Factory lying between the villages of *Putteetah* and *Sirswabur*, called in the record sometimes by the one and sometimes by the other name. This Factory, with three others, belonged to two persons, named *Chunder Churun* and *Esserchund Neoghy*.

At the beginning of the year 1856 the *Neoghys* were indebted to *Mussumat Ooman Soondree*, the

(*a*) 7 Bingh. 153. (*b*) 5 Ben. Sud. Dew. Ad. Rep. 229.
(*c*) 6 Ben. Sud. Dew. Ad Rep. 39. (*d*) 7 Ben. Sud. Dew. Ad. Rep. 136.

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wife of *Tara Pershun Bagjee*, in the sum of Rs. 17,761, partly for moneys advanced by her, and partly for moneys advanced by *Dwarka Doss* on her husband's guarantee, for the purpose of carrying on the Factories; and those advances were secured by certain instruments of mortgage, dated the 20th of *January*, 1852, the 18th of *April*, 1853, and the 1st of *January*, 1856. These securities embraced the block of all the Factories, and their crops at least for the year 1856-7.

On the 1st of *January*, 1856, *Mussumat Ooman Soondree*, by an instrument called a deed of re-mortgage, assigned all her interest in the Factories, under the before-mentioned securities, to *Dwarka Doss*, in order to secure the sum of Rs. 9,761, being the balance then due in respect of his former advances, together with the future advances to be made by him for carrying on the Factories. And it was thereby provided that he should take the Factories under his control and management during the year 1263 *Fuslee*, or 1856-7; thereby giving him the first charge or lien on the crop.

It does not very clearly appear whether under this stipulation he took possession of the Factories; or, if he did so, how long he continued in possession. But on the 7th of *July*, 1859, he obtained a decree in the Civil Court of *Benares* against *Mussumat Ooman Soondree* and the *Neoghys*, for the sum of Rs. 23,672, as then due to him upon his mortgage; and on the 15th of the same month he and the *Neoghys* filed in Court a petition embodying the terms of a compromise into which they had entered. The effect of this was that *Dwarka Doss* was to suspend the execution which he had taken out under the decree for Rs. 23,672;

was to advance further sums for manufacturing indigo from the stumps then on the ground; and was to have the disposal of all the indigo manufactured. The works were to be superintended by one *Balgobind Doss Seith*, whom the *Neoghys* had nominated as their Agent for that purpose. The rights of *Dwarka Doss*, under the execution for any balance that might remain to him after the sale of indigo, were expressly reserved to him both against the Factories and against all the Defendants to his suit. This arrangement was carried out by placing a servant or Agent of *Dwarka Doss* in charge of the Factories.

On the day on which this instrument of compromise was filed in the *Benares* Court (the 15th of *July*, 1859), the Respondent obtained a decree in the Court of the Principal *Sudder Ameen* of *Mirzapoor* against the *Neoghys* for the sum of Rs. 764, alleged to be due to him upon a mortgage of the *Putteetah* Factory, dated in *Phagoon Budee* 1st *Sumbut* 1911 (being some time in A.D. 1855). *Dwarka Doss* intervened in this suit as an objector, insisting that the Factory had been attached for money due to him, and that the claim was fraudulent. But the Principal *Sudder Ameen* held that the objection could not be tried in that suit, and was no bar to the making of the usual decree in a suit based upon a simple mortgage-bond. He accordingly passed the ordinary decree against the Defendants (the *Neoghys*) and the mortgaged property for the sum found due.

The Respondent took out execution on this decree for Rs. 878. 10a. He first obtained an Order for the attachment of both the *Putteetah* Factory and another Factory known as the *Soorma* Factory, with the appurtenances of each, and of fifty *maunds* of indigo alleged

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to be at the former, and of thirty *maunds* of indigo, or thereabouts, alleged to be at the latter Factory.

But on the 17th of *September* he made a further application to the Court, wherein he expressed his desire to abandon the execution against the *Soorma* Factory, and submitted a more detailed list of the property at the *Putteetah* Factory. He limited also the quantity of indigo to be attached at his suit to eight *maunds*. The Order of the Court was that the attachment should be limited to the property comprised in this last list.

On the 23rd of *September*, the *Ameen*, accompanied by two servants of the Respondent, who went to point out the property, proceeded to attach the Factory and other property detailed in the application of the 17th of *September*. He made an actual entry upon the lands, and took an inventory of the property attached. He could not, however, complete the attachment of the eight *maunds* of indigo by actual seizure. These were part of a much larger quantity kept in a storehouse, which was under lock and key; and the servants of *Dwarka Doss* refused to give him access to the storehouse, or to remove this lock. In these circumstances he put his own lock also upon the door, and retired, leaving two *Peons* in charge of the property attached.

The Appellant, having heard of the applications for the attachment, had on the 22nd of *September* applied to stay it. But as the *Dusserah* holidays, during which the Courts are closed for some weeks, began on the 24th, this application was ordered to stand over until after the vacation; and the same cause prevented any further application touching the actual attachment.

In *October* the *Ameen*, armed with a Magistrate's Order, and accompanied by a Blacksmith, went to the storehouse for the purpose of breaking *Dwarka Doss's* lock, but appears to have desisted on the threat of the people in charge of the Factory to quit the premises if the lock was broken, and to leave him responsible for all the indigo there.

On the 5th of *November*, these circumstances having been brought to the notice of the Principal *Sudder Ameen*, he passed an Order to the effect that if the Defendants to the Respondent's suit, or their Agents, should fail to appear in Court within a week, and substantiate their objection to the opening of their lock, it should be broken, and the eight *maunds* of indigo be forcibly attached.

On the same day he required the Respondent, as the decree-holder, to answer the Appellant's objection of the 22nd of *September* within four days.

On the 25th of *November*, the *Ameen* having in the meantime received no Order to suspend the attachment of the indigo, proceeded, under the Order of the 5th of *November*, to remove the lock, attached eight *maunds* of indigo pointed out to him by a servant of the Respondent; and made two inventories, one of the eight *maunds* of indigo attached, the other of the property found in the storehouse, which was not attached. Owing, however, to some difficulty about weighing the indigo, all this property remained in the storehouse, apparently under the lock of the *Ameen*, or in charge of his *Peons*, until the 8th of *December*, when the eight *maunds* were finally weighed and removed to a separate place, and all the other contents of the storehouse were left at the disposal of *Dwarka Doss's* people.

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On the 12th of *December* the *Ameen* submitted to the Court a further report of his proceedings, and stated that he had, according to the Respondent's request, attached no property belonging to the Factory except the eight *maunds* of indigo. The objection filed by the Appellant on the 22nd of *September* appears to have been thenceforward confined to these; and it was finally disposed of by an Order of the 3rd of *January*, 1860, which, on the ground of the preferential claim of *Dwarka Doss*, directed the release of the eight *maunds* of indigo from attachment.

Some difficulty in carrying out this Order was occasioned by the refusal of *Dwarka Doss's* Agents to receive back this indigo, except on terms with which the *Ameen* would not comply; but ultimately the eight *maunds*, and whatever else had been under attachment, were, by Order of the Court, left at the disposal of those who were in possession and charge of the Factory; and the *Peons* were withdrawn from the premises on the 28th of *February*, 1860.

Upon this statement of admitted facts, it appears clear to their Lordships that *Dwarka Doss* had, by reason of the attachment of the 23rd of *September*, 1859, and subsequent proceedings, sustained an injury, for which he was entitled to claim substantial damages. The attachment was wrongful and irregular. The right of the Respondent, under his decree, was to sell the Factory pledged to him, subject to the rights of *Dwarka Doss* under his prior mortgage. He had no right to invade or disturb the possession of the prior Mortgagee by placing *Peons* upon the property, in order to attach the Factory as a step towards the judicial sale. Under the procedure, as it existed before 1859, this could not have been done. The

attachment must have been constructive. But under the new Code of procedure, which had come into force on the 1st of July, 1859, the proper course was to issue and publish a written notice under the 235th and 239th sections of Act, No. VIII. of 1859. For the actual seizure of the eight *maunds* of indigo, to which the execution was ultimately reduced, there was even less justification. The manufactured indigo was not included in the Respondent's mortgage. And that it was not part of the general property in the possession of the *Neoghys*, that *Dwarka Doss* had or claimed a lien upon it, the Respondent had had ample notice in his own suit, wherein *Dwarka Doss* had intervened as objector, and by the proceedings of the 12th of *May*, 1859, touching a distress for rent which has been put in evidence in the cause. And the manner in which this wrongful attachment was carried out, the placing by the *Ameen* of his lock upon the door, subjected *Dwarka Doss* to the additional wrong of having the contents of the *godown*, to which *ultra* the eight *maunds* of indigo the Respondent made no claim, taken out of his control and dominion from the 23rd of *September* until the 8th of *December*. It is idle to say that his people ought in the first instance to have given the *Ameen* access to the *godown*, and delivered the eight *maunds* of indigo, or that they ought to have acted according to the directions of the *Ameen* concerning the use of the two locks, supposing those directions to have been given to the *Peons*. The case cited by Mr. *Leith* from *Bingham's* Reports, shows that in this country a Plaintiff, in an action for a trespass of very similar character, may, without proving special damage, recover substantial damages. Nor can it

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be said that in this case there is no evidence of the malicious character which the plaint imputes to the trespass.

The plaint in this case was filed on the 25th of *February*, 1860. The damages claimed were all in the nature of special damages, and consisted of three items, viz., Rs. 14,000, "on account of loss of 70 *maunds* of indigo at Rs. 200 per *maund*;" Rs. 5,545, on account of indigo which it was alleged *Dwarka Doss* was prevented from manufacturing from indigo plants; and Rs. 2,250, on account of indigo which it was alleged he was prevented from manufacturing from indigo stumps.

Both the Courts below have found, and their Lordships can see in the evidence no sufficient grounds for disputing the justice of that finding, that the Plaintiff has failed to establish any claim to damages in respect of indigo which, but for the wrongful attachment, might have been manufactured from either plants or stumps. The evidence shows pretty clearly that there had been no indigo plant to be manufactured, and leaves it more than doubtful whether all the stumps had not been converted into indigo before the 23rd of *September;* and whether, if any had then remained to be used in the manufacture of indigo, the attachment would have prevented them from being so used. The two last items of damage may, therefore, be dismissed from consideration.

The claim, however, to recover damages for loss on account of the manufactured indigo, was disposed of by the Courts below in a different way. The Principal *Sudder Ameen* held that, though the Plaintiff did probably, as stated by the European indigo Factors, sustain some trifling loss, owing to the storehouse

having remained locked up, this was due "to the refusal of his Agent to unlock the door on the *Ameen's* application, and that this resistance of a legal process on their part, joined with a disposition to break the peace, caused the loss to the Plaintiff." And the *Sudder* Court considered that no good proof had been furnished that the Plaintiff's Agents were ever prevented from having free access to the *godown*, for the purpose of turning and drying the indigo cakes; but that, on the other hand, the Plaintiff, instead of entering his objections in a legitimate way to the attachment of the property, did, through his Agents, contumaciously obstruct the *Ameen* employed to distrain. The learned Judges seem to rest the first of their conclusions partly on the ground that the Plaintiff ought not to have kept his lock on the *godown;* partly on the evidence given by the *Ameen* of his instructions to the *Peons* to open his lock, whenever the Plaintiff's people opened theirs.

Their Lordships think that neither Court has assigned grounds which warrant the conclusion at which both have arrived. They have already expressed their opinion that the attachment was wrongful. The proposition that a man whose possession was wrongfully invaded ought to have given effect to that invasion, because it was made under colour of legal process, by removing the lock of his own storehouse, appears to them to be untenable. The argument that the Plaintiff ought to have entered his objection in a legitimate way is met by the facts that he had already entered an objection to the execution, and that, by reason of the closing of the Court during the *Dusserah* vacation, he could neither follow up that objection nor make any further objection to

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the acts of the *Ameen* until the holidays were over. Again, the case of *Bayliss* v. *Fisher* (7 Bingh., 153), already referred to, shows that even if the instructions said to have been given by the *Ameen* to the *Peons* were really given (as to which there is a conflict of evidence), the Plaintiff was neither bound to accept the permission to use his own property so accorded to him; nor, if he had accepted it, would have lost his right of action. It appears, therefore, to their Lordships that the Plaintiff's suit has been improperly dismissed with costs, and that he was, at the very least, entitled to a judgment for nominal damages. If it be important in *India* to check any tendency to resist the execution of legal process, it is hardly less important to maintain the principle that they who misuse legal process are responsible for the consequences of that misuse.

It has been argued for the Respondent that the suit was properly dismissed, inasmuch as the Appellant was by the form of his plaint limited to the three heads of special damage therein laid, and, having failed to prove any such special damage, was precluded from recovering general damages for the trespass.

Their Lordships, however, are of opinion, that there was evidence in the action on which the Courts below might have awarded some damages on account of the loss sustained in respect of the manufactured indigo. Nor are they prepared to allow that if this had not been the case, the Plaintiff could have recovered nothing. The plaint might have been more accurately drawn, but, substantially, it seeks damages generally, as consequent on the wrongful attachment of the Factory. The principle ordinarily applied to actions of *tort* is, that the Plaintiff is never precluded from

recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action. Thus in an action of slander for words actionable *per se*, when the Plaintiff lays special damages, and fails to prove it, he is nevertheless entitled to such damages as the jury think right to give him. It would be otherwise if the words were not actionable *per se*. In the present case the gist of the action is not the special damage, but the unlawful attachment; and the Plaintiff would not have been precluded from recovering ordinary damages for that actionable wrong, even if he had wholly failed to prove the special damage laid.

Taking this view of the case, their Lordships feel that it is not desirable to remit the cause for the assessment of damages in *India*, since no case has been made for taking fresh evidence, and the Judge below would have only those materials for a judgment which are now before their Lordships.

They have, therefore, determined to take the course which was taken by this Committee in the case of *Le Breton* v. *Ennis* (4 Moore's P. C. Cases, 323), and to assess the damages themselves. It must be confessed that the Appellant has not given the best evidence that he could have given on this point. He might have proved for what the indigo had been sold, and for what it might have been sold if it had not been damaged, and had been sold at the proper time. Weighing, however, all the circumstances of the case, their Lordships feel justified in assessing the damages at Rs. 500.

Their Lordships have felt some difficulty about the costs of the Courts below, and those of this appeal. The costs of an action in *India*, particularly the

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stamp duties payable on the proceedings, depend a good deal on the value of the thing claimed. It is accordingly the practice of the Courts in *India*, when a Plaintiff has recovered less than he has claimed, to apportion the costs in the proportion which the amount recovered bears to that which was claimed. In the present case there are strong indications of a bad feeling between the parties, which, if it prompted the original attachment, has probably, on the other hand, induced the Appellant to swell his demand beyond all reasonable bounds. The evidence affords no grounds for a claim for damages amounting to the appealable sum of Rs. 10,000; and the amount actually recovered falls far short of that sum. Yet, unless the claim had been thus unduly magnified, the Appellant could not have appealed to Her Majesty.

In these circumstances, their Lordships think they must direct the costs below to be apportioned according to the ordinary course of the Courts below, and that they ought not to give to either party the costs of this appeal. In making the apportionment, the Appellant will, of course, receive credit for any costs which he may have paid under the decrees reversed.

The Order, therefore, which their Lordships will humbly recommend Her Majesty to make is, that the decrees both of the *Sudder* Court and of the Civil Court of *Mirzapore* be reversed; that the Appellant be declared entitled to recover damages to the amount of Rs. 500; that the cause be sent back to the *Sudder* Court, with directions to enter judgment for the Plaintiff for that sum, and to deal with the costs in both the Courts below according to the practice of those Courts in like cases, and that each party do bear his own costs of this appeal.

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2. Held, upon the construction of sec. 11, *Ben.* Reg. XV. of 1793, that the production of accounts by a Mortgagee in possession seeking to foreclose cannot be called for when there is neither plea nor proof that the usufruct had liquidated the principal and interest, and where no deposit had been made to cover the balance admitted to be due.

The necessity for a Mortgagee in possession to produce his accounts arises :—

First, when the Mortgagor has deposited the principal money, leaving the question of interest to be settled by an adjustment of the account.

Secondly, when the Mortgagor has deposited all that he admits, or alleges, to be due; and

Thirdly, when he pleads and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the mortgaged premises. [*Forbes* v. *Ameeroonissa Begum*] - - 340

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5. A party is not bound to appeal from every Interlocutory Order which is a step in the procedure that leads to a final decree. It is open on appeal from such final decree to question an Interlocutory Order. [*Sheonath* v. *Ramnath*] 413

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6. The Plaintiff claimed as damages a larger sum than the appellate Court awarded. No costs were given in the appeal. Held, following the practice of the Courts in *India*, that as the Plaintiff recovered a less amount than he laid in his plaint, his costs in the Court below were to be apportioned to the amount recovered, and not to the sum claimed. [*Mudhun Mohun Doss* v. *Gokul Doss*] - - - 563

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Though a Plaintiff after a wrongful distress may have received permission to use his own property, he is neither bound to accept the permission so accorded to him, nor, if he does not accept it, will he lose his right of action. In such case he is entitled, at least, to a judgment for nominal damages.

On appeal, the appellate Court was of opinion, that there was evidence from which the Court below ought to have awarded damages in respect of losses sustained by an illegal attachment. As the whole evidence was before the appellate Court, it was held that there was no necessity to remit the case to *India* for re-trial, and the Judicial Committee accordingly assessed the damages from the materials before them. [*Mudhun Mohun Doss* v. *Gokul Doss*] - - - - - 563

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1. In a question of disputed boundaries, the *onus probandi* lies upon the Plaintiff to prove by independent evidence his right to recover. But in circumstances held, that the mere failure on the Plaintiff's part to suppose the burthen of proof cast upon him, as to part of the lands claimed, was not conclusive as it would be in ejectment,

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2. When false witnesses or forged documents are produced to support a case, such facts naturally create suspicion, but if the Appellate Court has to deal with a just case, though foolishly and wickedly attempted to be supported by false evidence, such circumstance will not prejudice the judgment on the merits, when the case is supported by independent evidence.

So ruled, when their Lordships were satisfied from the evidence that an ancient tenure existed, which was endeavoured to be supported by a forged document and evidence. [*Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy, Bahadoor*] 123

3. Suit by *A.*, to recover real estate in the possession of *B.*, and of his predecessors, whose title had been unchallenged for forty-four years, on the ground that the estate was mortgaged only by *A.'s* ancestors, and that *B.*, and those claiming under him, were only usufructory mortgagees in possession. Held, that the *onus probandi* was on *A.*, who could only succeed by the strength of his own title, and not by reason of the weakness of *B.'s* title.

If a party put in evidence in support of his title, documents proved to be forged, but the other evidence adduced by him is not impeached, the Court, in rejecting the forged documents, will take the unimpeached evidence into consideration, and if satisfied, adjudicate thereon. [*Sevvaji Vijaya Raghunadha Valoji Kristnan Gopalar* v. *Chinna Nayana Chetti*] 151

4. Although in Indian proceedings the presumption in favour of the genuineness of documentary evidence is very weak, yet there is no presumption in favour of forgery. Thus, when a long series of documents are produced, showing a reasonable origin of title nearly a century ago, a regular deduction of that title, and a possession consistent with it, the evidence of intrinsic improbability must be very strong to counterbalance the weight of such evidence. [*Wise* v. *Bhoobun Moyee Debia Chowdrainee*] 165

5. In a suit, which involved a disputed question of fact as to an alleged adoption and the due execution of a Will, the Court in *India*, disregarding other evidence, relied solely upon the evidence of a witness examined at the instance of the Court itself. The effect of the evidence of this witness was to show that at the time of the adoption and execution of the Will, the alleged Testator was in a dying state, and, although at times roused to consciousness, was, from his enfeebled mind, incapable of understanding the acts he was represented to have performed: the Court below, however, upon the evidence of this witness, as to his testamentary capacity, corroborated, as it thought, by a letter of the widow of the alleged Testator, recognizing the

adoption, and by her acquiescing in the performance of certain funeral rights of her deceased husband by the supposed adopted son, pronounced both the adoption and the will to be valid. Upon appeal, held, that although as a general rule, in a question of fact, the Judicial Committee were unwilling to disturb the judgment of the Court below, yet that as it was the duty of the appellate Court to weigh the evidence and probabilities, and form an independent judgment, and taking into consideration the evidence regarding the state and capacity of the alleged adopter and Testator, they were of opinion that the evidence relied upon was so unsatisfactory, that neither of the decrees of the Courts below could be supported, and reversed the same with costs. [*Tayammaul* v. *Sashachalla Naiker*] - - 429

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2. The effect of a foreclosure decree in the Supreme Court in a mortgage suit between Hindoos is equivalent to a decree establishing proprietary right in the Courts in the *Mofussil* in a similar suit. [*Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*] 540

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2. Where there had been a fraudulent sale, under Act, No. I. of 1845, by *A.*, the Mortgagee's representative in possession, that Act does not apply so as to defeat the Mortgagor's equity of redemption, and that the sale is to be considered as a private sale, and impressed a trust on the estate which passed under it.

Held further, that as there was a fraudulent agreement between the Mortgagee's representative in possession and the purchaser at the Government sale, both were estopped as against the Mortgagor, from relying upon the illegality of their contract. [*Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*] - - - - - - - - 540

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Proof of.

See "DAMAGES."

GUARDIAN AND WARD.

In 1850, the guardian of a Minor (his stepmother) by an *Ikrarnamah*, among other things, charged the Minor's ancestral estate with the payment of Rs. 27,000 in favour of *L.*, the amount of his alleged claim against the estate, respecting which an appeal was then pending, but to which estate he was himself a debtor, undertaking at the same time to prosecute certain claims against *M.*, *L.* agreeing to advance money for that purpose, and to resist certain claims brought by *M.* against the Minor's estate. In *February*, 1851, *M.*, having obtained judgment against the estate for Rs. 26,986, and taken out execution thereon, the estate was advertised for sale on the 20th of that month. To prevent the sale, *L.* advanced the amount of the judgment debt, and on the 19th of that month commenced a suit against the guardian, in which he claimed the Rs. 26,986, the amount advanced by him, and the Rs. 27,000 agreed to be paid him by the *Ikrarnamah*, and the further sum of Rs. 1,354, alleged to have been paid by him for the proceedings against *M.*, making together Rs 53,341. On the following day the guardian filed a confession of judgment admitting the debt, hypothecating the Minor's estate, and undertaking to pay the same by instalments, with the exception of the Rs. 27,000, at six *per cent.* interest. The instalments not being paid, *L.*, in 1853, took out execution on the judgment, and under the execution put up the estate for sale, and became the purchaser himself. On the Minor obtaining his majority, he brought a suit to set aside the sale, impeaching the transaction as fraudu-

lent and collusively obtained by *L.* from his late guardian. The Courts in *India* set aside the sale upon the ground of fraud, and decreed the restitution of the estate, with mesne profits and damages, subject to the repayment, by way of reduction of the Rs. 26,986 at five *per cent.* Upon appeal, such decree affirmed by the Judicial Committee, first, on the ground that the transaction was fraudulent and collusive, and prejudicial to the estate of the Minor; there being no evidence to show the necessity for the guardian obtaining the pecuniary assistance sought, or to justify her submitting to *L.'s* extraordinary terms contained in the *Ikrarnamah*, by allowing, without consideration, his doubtful claim against the Minor's estate, to which he really was a debtor himself; and secondly, that *L.*, who set up the charge, had failed to relieve himself of the burden which the Hindoo law cast upon him, of showing that he had, at least, good ground for supposing that the transaction was for the benefit of the Minor's estate.

In setting aside the *Ikrarnamah* and sale, interest was allowed *L.* on the Rs. 26,000 advanced by him, at the rate of six *per cent.* contracted for in that instrument, in lieu of five *per cent.* awarded by the *Sudder* Court. [*Lalla Bunseedhur* v. *Koonwur Bindeseree Dutt Singh*] 454

HINDOO LAW.

1. In the year 1811, *G.* being childless, executed a deed of *Onoomuttee puttro* (*i.e.*, of permission), by which he gave power to his wife, *C.*, to adopt a son. He afterwards had a son, *B.*, by his wife, *C.* In 1819, two years after his son's birth, and while he was living, *G.* executed the following instrument:—"This is an *Onoomuttee puttro* to the following purport—Prior to the birth of a male child from your womb, I executed in your favour an *Onoomuttee puttro* on the subject of your receiving an adopted son. Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race or from a different race, for the purpose of performing mine or your *Sradh* and other rites, and for the *Sheba* of the gods, and for the succession to the *Zemindary* and other property, on which, if the adopted son be non-existent, which God forbid, then you shall, according to your pleasure, on failure of one, adopt other sons in succession, to avoid the extinction of the *pinda;* that *dattaka* son shall be entitled to perform your and my *Sradh*, &c., and of our ancestors." *B.*, on coming of age, succeeded to the ancestral and other estate of his father who had died. On *B.'s* death, childless, his widow succeeded as heir to her deceased husband, taking a vested interest in the whole of his estate. Some time after *B.'s* death, *C.*, his mother,

exercised the power given her by the instrument of 1819, by adopting a son to *G.* The *Sudder Dewanny* Court held, first, that the above instrument was of the nature of a testamentary disposition, and secondly, upon its construction, that it created a limitation on failure of male issue of the Testator, in the lifetime of his wife, to the son to be adopted by her as a *persona designata.* Upon appeal, such decree reversed, the Judicial Committee holding:

First, that the instrument was simply a permission to adopt a son, as in the absence of any devise it could not be considered as of a testamentary character.

Secondly, that although a testamentary power of disposition by Hindoos in the Presidency of *Bengal* has been established by the decisions of the Courts, yet the nature and extent of such power, so far as relates to limitations in tail male, or executory devises, is not to be regulated or governed by any analogy to the law of *England*, which law applies to the wants of a state of society widely differing from that which prevail among Hindoos in *India.*

Thirdly, that, as an adopted son by the Hindoo law takes by inheritance, and not by devise, and as by that law, in the case of inheritance, the person to succeed must be the heir of the full owner, *B.*, the son, was the last full owner, and his wife succeeded at his death as his heir to her widow's estate; and

Fourthly, consequently, that the adoption by *C.* under the *Onoomuttee puttro*, was void, as the power was incapable of execution.

Whether, by the Hindoo law, *G.* could have restricted the interest of his son *B.* in his ancestral and other estate to a life interest, or could have limited it over, if his son *B.* left no issue male, or such issue male had failed, to an adopted son of his own—*Quære?* [*Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdhry*] 279

2. An adult brother, a member of a joint undivided Hindoo family, in consequence of disputes, separated from the family. As no regular partition of the estate was made, the lands remained undivided, and each member took his share of the rents. After a short separation, the brother returned to the family, and it was by a deed of *Ungshoputtur*, or settlement, agreed that the acquisitions made by the elder brother during the separation should go into the joint funds. During the separation the elder brother purchased a *Putnee Talook.* Held, that the reunion of the brother to the family remitted him to his former *status*, as a member of a joint Hindoo family, and that he was entitled to share in the purchase, as it must be presumed to have been made out of the funds of the joint estate.

The presumption of Hindoo law is, that the property not shown to be separate is joint, and the *onus*

probandi lies on the party claiming it as separately acquired. [*Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry*] - - 403

3. *D.*, one of five brothers, constituting an undivided Hindoo family, but having no ancestral estate, acquired personal property with which, with the aid of his brothers, he established and carried on a banking business at five different places. Such circumstances, under the general principles of Hindoo law, held to constitute a joint family property in which the brothers were entitled to share.

The burden of proof that such was only an ordinary partnership, and not a jointly acquired family property, lies on the party claiming it to have been separately acquired.

Ordinary co-partnership property is not subject to the rule of Hindoo Law, which excludes a widow from the succession at her husband's death to a share of the joint property of an undivided family. [*Rampershad Tewarry* v. *Sheochurn Doss*] - - - - - - - - - 490

4. The general rule, that possession of one member of a joint Hindoo family is the possession of all other members, does not apply where the party claiming has been clearly excluded from the family. [*Jowala Buksh* v. *Dharum Singh*] - 511

INJUNCTION

To restrain Lessor receiving rents.

See "LEASE."

INTEREST.

1. By an agreement between Principal and Agents, 10 *per cent.* was to be allowed as commission. The *Sudder* Court, under Act, No. XXXII. of 1839, allowed 12 *per cent.* per annum from the date of the suit, on the amount found due to the Agents: such rate of interest disallowed on appeal, as that Act does not apply to an agreement between parties regulating the amount of interest. [*Murtunjoy Chuckerbutty v. Cockrane*] - 229

2. In setting aside an *Ikrarnamah* and sale, interest was allowed to *L.* on Rs. 26,000, advanced by him at the rate of six *per cent.*, contracted for in that instrument, in lieu of five *per cent.* awarded by the *Sudder* Court. [*Lalla Bunseedhur* v. *Koonwur Bindeseree Dutt Singh*] 454

3. Interest at 12 *per cent.* per *mensum* charged in lieu of profits, which a party failed to account for. [*Rampershad Tewarry* v. *Sheochurn Doss*] - - - - - - - - 490

INTERLOCUTORY ORDER,

Appeal from.

See "APPEAL," 4, 5.

INTIMIDATION

Fraud and pressure by Government Officer to induce a party to execute deed.

See "FRAUD."

JOINDER

Of parties.

See "PLEADING," 4, 5.

JOINT HINDOO FAMILY.

See "HINDOO LAW," 2, 3, 4.

JUDICIAL SALE.

See "GUARDIAN AND WARD."

"MORTGAGE," 1.

"POSSESSION."

JURISDICTION

In the District of *Ganjam*, situate in a remote part of the Presidency of *Madras*, the administration of justice is by the Act of the Legislative Council of *India*, No. XXIV. of 1839, vested in an Officer called "The Agent of the Governor of *Madras*," who exercises both judicial and revenue authority within the District. The Court there established is not subject to the *Madras* Regulations applicable to the ordinary Tribunals. In these circumstances it was held that it was not to be expected that the proceedings before such a Court should be conducted with all the attention to technical rules observed in the Regular Courts in *Madras;* and, therefore, that it was sufficient if the proceedings had been such, in point of form, as to enable each party fairly to bring forward and establish his case, and the decision of the Agent consistent with law and justice. [*Pakala Balakristnama Patrulu* v. *Sree Naraina Mardaraz Devu*] - - - - - - - 60

See "PRACTICE," 8.

LACHES.

See "PRACTICE," 8.

LEASE.

A., the lessee for a term of a *Zemindary*, brought a suit against *B.*, the lessor, to prevent *B.* interfering with his possession, which he had under the lease granted to him by *B.*, in consideration of certain pecuniary advances made by him to *B.* The relief sought was, in effect, an injunction to restrain *B.* from collecting the revenue of the *Zemindary*. The defence set up by *B.* in his answer was, in substance, that the lease was an executory contract, and, being without consideration, could not be enforced; and was moreover void for maintenance, by reason of a subsequent agreement for the advance of a sum of money to carry on a suit, which agreement had not been carried out. The Judge of the Civil Court adopted this view, and held the lease void. The High Court of *Madras*, on appeal, treated the case as a suit for specific performance, and decreed execution of the lease. Upon appeal, the Judicial Committee sustained the decree as to possession under the lease; but as it appeared from the evidence questionable whether the transaction in respect of the lease did not really operate only as a loan, and as a right to redeem might exist, the affirmance was made with a declaration, that it was to be without prejudice to the

claim (if any) of *B.*, to which he might be entitled, and to any question which might be raised as to the amount actually advanced by *A.* to *B.* [*Kamala Naicken* v. *Pitchacootty Chetty*] - - - 386

See "LIMITATION OF SUITS," 3.

"TENURE," 2.

LEX LOCI

Of the Province of Oude.

See "OUDE."

LIFE ESTATE.

Whether by Hindoo law a Testator can restrict his son to a life estate in the ancestral property, or limit it over? [*Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*] - - - 279

LIMITATION

By Will of estate of a Hindoo in tail male.

See "HINDOO LAW," 1.

LIMITATION OF SUITS.

1. By sec. 9 of the Limitation Rules for the guidance of Civil Courts in *Oude*, as explained by the Circular Order of the Judicial Commissioner, No. 104 of 1860, the limitation of suits is fixed for three years in "suits for money lent for a fixed period, or for interest payable on a specified date, or dates, or for breach of contract, unless there is a written engagement or contract, and where Registry Offices existed at the time such engagement was registered, within six months of its date." That section held not to apply in the case of a Bond executed in 1855, before the annexation of *Oude*, when there was no Registry at the place it was made, and sued for in 1860, such transaction falling within section 14 of that Circular Order, where the period of limitation is, six years for "all suits on Bonds registered within six months of their date, or on Bonds formally attested when there was no means of registry, and all other suits for which no other limitation is expressly provided by these rules;" and a decree of the Judicial Commissioner of *Oude*, holding that a suit on the Bond was barred by the three years' limitation, provided by section 9 of the rules, reversed on appeal.

Quære, whether the rule of limitation, as a bar to the suit, can be entertained without being pleaded. [*Saligram* v. *Mirza Azim Ali Beg*] 114

2. A sale took place in 1833. Possession of the *Mouzahs* was taken from the purchaser in 1841, who shortly afterwards died, leaving a widow, who under a power from her deceased husband adopted an infant son. In 1853 she instituted a suit for the recovery of the *Mouzahs*. Held, that the death of the purchaser and minority of the heir took the case out of the *Ben.* Reg. of Limitation, III. of 1793. [*Wise* v. *Bhoobun Moyee Debia Chowdraines*] - - - - 165

3. By a *Pottah*, in the nature of a lease in perpetuity, granted by an ancestor of *A.*, in the year 1796, to the ancestor of *B.*, of a piece of land, *B.* and his heirs were to enjoy a house built thereon, in consideration of setting up an idol in the house, without payment of rent. Upwards of sixty years after the date of this grant, during which period the idol remained and its worship uninterruptedly continued, no rent having been paid by the grantee or his heirs, *A.*, without any demand for rent, or bringing a suit for assessment of the property, brought a suit against *B.* to recover six years' arrears of rent for the house, at the rate fixed by *Ben.* Reg. XIX. of 1793, sec. 10. Held, reversing the decree of the *Sudder* Court, that *B.*, and those under whom she claimed, having been in undisturbed possession, and the cause of action having arisen sixty years before the institution of the suit, such suit was barred by cl. 3, sec. 3, of *Ben.* Reg. II. of 1805.

Held further, that while that clause takes away the cognizance by any Court in *Bengal* of a suit, if the cause of action should have arisen sixty years before the institution of the suit, it distinguishes between the effect of the twelve years' limitation and that of sixty years, by precluding all inquiry into any original defect in the title under which the possession for the latter period obtains, and made it, in effect, unavailing to show that the possession of *A.* commenced under a grant made null and void by the Regulation of 1793.

Whether the twelve years' limitation provided by the *Ben.* Reg. II. sec. 3, cl. 1, of 1805, can be held applicable to such a suit. *Quære?*

Semble. That to maintain such an action, a demand for arrears of rent should have been preceded by a suit for assessment of rent under *Ben.* Reg. XIX. of 1793, sec. 10. [*Mussumut Chundrabullee Debia* v. *Luckhea Debia Chowdrain*] 214

3. The Limitation of suits Act, No. XIV. of 1859, sec. 1, cl. 9, limits the right to recover money lent, or interest to three years, from the time when the debt became due, unless there is a written engagement to pay the money lent or interest. By section 24 of that Act, it is provided that such Act should not take effect in non-Regulation Provinces, until it shall be extended thereto by public notification by the Governor-General in Council, and, when extended, all suits within such Province which shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if the Act had not been passed. This Act was not extended to the Province of *Oude* until *July*, 1860. In a suit brought in *January*, 1862, to recover a balance of money lent with interest, the last advance of which was made more than three

years before the commencement of the suit, it was held by the Courts in *Oude* to operate as a bar to the suit. Upon appeal, such finding reversed, as it fell within the exception provided by that section, and was to be determined as if the Act had not been passed.

A letter written by a debtor in answer to a demand for payment of a debt and interest, in which he promised to pay the debt by instalments, and begging to be let off payment of interest, is an ample acknowledgment within section 4 of the Limitation of suits Act, No. XIV. of 1859, to take the case out of the operation of that Act. [*Shah Mukhun Lall* v. *Nawab Imtiazood Dowlah*] - - - 362

4. In 1814 a litigation commenced between a *Zemindar* and his tenants, called the *Moonshees*, by reason of the *Zemindar* dispossessing them of lands held under a *jote* tenure. A decree was made in favour of the *Moonshees*, when the *Zemindar* assessed the *jote* lands at a rent. The rent fell into arrear, and under a decree the *jote* lands were, in 1836, sold in satisfaction of the arrears and purchased by *J.* The decree-purchaser, was put in possession in 1839. There was another suit pending between the *Moonshees* and their mortgagee, in which a question arose whether these *jote* lands were included in the mortgage, which was decided in favour of the mortgagee in 1841, but *J.*, the then *jote* tenant, was no party to that suit, and continued in possession of his *jote* lands. Disputes arose between the mortgagee and *J.*, the *jote* tenant, and by an Order of the *Sudder* Court made in 1845, the *jote* lands were ordered to be put in possession of the mortgagee. In 1856 a suit was brought by *J.*'s representative to set aside that Order and to recover possession of the *jote* lands. The Courts in *India* held that there had been adverse possession from 1841, and that the suit was barred by *Ben.* Reg. III. of 1793, sec. 14. Upon appeal held: that as *J.*, the *jote* tenant, was not a party to the suit, under which the decree was made in 1841, the decree was not binding on him or those deriving title through him, and that the suit was not barred by effluxion of time by the Regulation, as the cause of action only arose in 1845. [*Tarakant Bannerjee* v. *Puddomoney Dossee*] - - - - - - - 476

5. Act, No. XIII. of 1848, is limited to Awards made by Collectors under *Ben.* Regs. VII. of 1822, IX. of 1825, and IX. of 1833, which gives to the revenue authorities judicial power to determine questions of possession, and the right of appeal from such Award is subjected to three years' limitation.

The general rule, that the possession of one member of a joint Hindoo family is the possession of all other members, does not apply where the party claiming has been clearly excluded from the family. In such

a case the possession is adverse, and under the general law of limitation the time will run from such adverse possession. [*Jowala Buksh* v. *Dharum Singh*] - - - 511

6. A decree of foreclosure made in 1847 by the Supreme Court at *Calcutta* was irregularly obtained. The mortgagees sold the mortgaged estate to *A*, who, in execution of the decree of foreclosure, which he had also purchased, dispossessed the mortgagor. The mortgagor in 1848 filed a Bill in the Supreme Court to set aside the foreclosure decree, and to redeem the mortgaged estate. *A.* was a party to that suit, but, *pendente lite*, having wilfully suffered the estate to fall into arrears of Government revenue, entered into an agreement with *M.*, whereby it was agreed that *M.* should bid for the estate when sold by auction at a sum less than its actual value. At the Government sale *M.* purchased the estate *Benamee*, and it was subsequently assigned to other alienees, *Benamee*. At the time of the sale to *M.*, the suit for redemption by the mortgagor was pending, and the Court afterwards set aside the decree of foreclosure, and thereby made the estate in the possession of *A.*, under his title from the mortgagees, subject to the equity of redemption of the mortgagor. A plaint in the nature of a supplemental suit was filed in 1860 by the Mortgagor in the Court of the District where the estate was situate, for possession consequent upon redemption, charging generally the whole transaction as between the Mortgagees, the purchaser, and subsequent alienees to have been collusive and fraudulent. The Defendant denied collusion or fraud, and pleaded in bar: first, the Act No. I. of 1845, sec. 24, requiring the suit to be brought within one year of the Government sale; secondly, the general law of Limitations, *Ben.* Reg. III. of 1793, sec. 14, the suit not having been brought within twelve years from the time when the cause of action accrued. Held by the Judicial Committee:—

First, that the decree of the Supreme Court, setting aside the foreclosure, placed the possession of *A.* upon the footing of a Mortgagee in possession, and that from that time his title and his possession were in privity with the mortgage title, and no longer constituted such an adverse possession as could be pleaded in bar to the suit, under *Ben.* Reg. III. of 1793, sec. 14. [*Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*] 540

MADRAS REGULATIONS.

Held, not applying to proceedings before the Tribunals established by Act, No. XXIV. of 1839, in the District of *Ganjam*. [*Pakala Balakrishnama Patrulu* v. *Sree Naraina Mardaraz Devu*] - 60

MAHOMEDAN LAW.

The *Punjab* Code of 1854, cl. 10, sec. 6, declares, that:—"By the

Hindoo and Mahomedan law, the dower of a married woman, if not entirely paid up at the time of marriage, is claimable by her at any subsequent time, and especially in the event of a divorce. Among Mahomedans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay. Such contract, if enforced by a Court, would ruin a Defendant who has divorced his wife, without reflecting on the liability to which he was subject. Still, although the full amount need not be decreed, yet, in the event of a divorce without a valid cause, heavy damages will be awarded to the wife in proportion to the means of the husband:" and the 11th section declares, that in the event of the husband's death, "the dower is treated as a debt, and takes precedence of the claims of heirs, but not of other debts; it stands on the same footing with them. In this case, the Court would possess the modifying power of clause 10, and award to the widow a fair sum, with reference to the assets of the estate and the circumstances of the heirs."

A Mahomedan of the *Soonee* sect, domiciled in *Oude*, and a member of the Royal family there, on his marriage, by a deed executed in the year 1838, settled a *crore* of rupees by way of dower. This dower was not demanded during the lifetime of the husband, but at his death, which event took place after the annexation of *Oude*, in 1856, the widow claimed the whole amount, although it would exhaust the entire property of the settlor, and totally exclude his heirs from succeeding to any part of his estate. The Judicial Commissioners of *Oude* applied the provisions of the *Punjab* Code to the case; and held, that according to that Code the deed was to be construed to mean, not the absolute sum settled for dower, which was from the position of the settlor an extravagant dowry, but an adequate provision for his wife; and directed the estate of the husband to be divided in moieties between the widow and the husband's heirs. Upon appeal, such decision affirmed by the Judicial Committee, who held,

First, that the Commissioners were right in applying the *Punjab* Code to the case; and

Secondly, that the Commissioners, under that Code, properly exercised their discretion in making an equitable division of the estate of the husband between the widow and the heirs. [*Mulkah Do Alum Nowab Tajdar Bohoo* v. *Mirza Jehan Kudr*] - - - - - 252

MAINTENANCE

Of Hindoo widow.

See "WIDOW," 3.

MALGUZARY.

See "TENURE," 1.

MANAGER.

Power of to charge Minor's estate.

See "GUARDIAN AND WARD."

MARRIAGE.

See "MAHOMEDAN LAW."

MESNE PROFITS.

See "ACCOUNT."

MINOR.

See "GUARDIAN AND WARD."

MISJOINDER.

See "PLEADING," 4, 5.

MOCURRERY.

See "TENURE," 3, 4.

MORTGAGE.

1. When the account of the mesne profits and expenditure by the mortgagees in possession are unsatisfactory, an account, whether as incidental to the question of foreclosure or redemption, is to be taken, as provided by *Ben.* Regs. XV. of 1793, sec. 11, and I. of 1798, sec. 3.

If the interest of the Mortgagor in the mortgage estate has been sold under a decree, and the sale takes place before the notice to foreclose was filed, such notice, to be effectual, must be served on the purchaser or decree-holder. [*Mohun Lall Sookool* v. *Goluck Chunder Dutt*] - - - - - - - - - 1

2. Anterior to the year 1806, the rights of a holder of a *Bye-bil-wuffa* (Conditional sale) were enforceable according to the strict terms of the agreement. It was then necessary to pay the amount when due. By *Ben.* Reg. XVII. of 1806, a modification of this strict rule of the rights given to the holder of such a contract was introduced. The 7th section gives the Mortgagor a right of redemption within one year after an application by the Mortgagee to the Court under the 8th section of that Regulation. After such an application the Mortgagor must either pay or tender the money lent, or the balance then due, if any part of the principal has been discharged, and if the Mortgagee has not been in possession, any interest that may be due, or he must make a deposit pursuant to *Ben.* Reg. I. of 1798, sec. 2.

The general effect of these Regulations is, that if anything be due on the mortgage, and the Mortgagor make no deposit, or an insufficient one, the right of redemption is gone at the expiration of the year of grace. But the title of the Mortgagee is not completed, he must bring a suit to recover possession, if he is out of possession, or obtain a declaration by the Court of his title, if he is in possession, and in that suit the Mortgagor may contest the validity of the Conditional sale, or the regularity of the proceedings taken under Regulation XVII. of 1806, in order to make it absolute, or he may prove that nothing is due, or that the deposit is sufficient to cover what is due; but the issue, so far as the right of redemption is

concerned, will be whether anything remained due to the Mortgagee at the end of the year of grace, and if so, whether the necessary deposit had been made. If that is found against the Mortgagor, the right of redemption is gone. [*Forbes* v. *Ameeroonissa Begum*] - - - 340

See "LIMITATION OF SUITS," 6.

MORTGAGEE IN POSSESSION.

See "MORTGAGE."

"TITLE," 3.

MOUROOSEE ISTEMRAREE.

See "TENURE," 2.

MULTIFARIOUSNESS.

See "PLEADING," 4.

ONOOMUTTEE PUTTRO

(Permission to adopt).

See "HINDOO LAW," 1.

ONUS PROBANDI

Lies on a member of a Hindoo family claiming property as separately acquired to establish that fact. [*Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry*] 403

See "HINDOO LAW," 2, 3.

"TENURE," 4.

"TITLE," 2, 3, 4.

OUDE.

Lex Loci of the Province of *Oude*.

The principles of law as well as the rules of procedure of the *Punjab* Code of 1854, were introduced into *Oude* in 1856, on its annexation to the British Crown, to be adopted as the basis of the administration of the law in that Province, and to be applied so far as they appeared to the Judicial Commissioners appointed for the administration of justice there, not to be unsuited to the circumstances of the country; except so far as they were founded upon local custom, varying the general law, whether Hindoo or Mahomedan, when the Code was not to be applied to *Oude*. [*Mulkah Du Alum Nowab Tajdar Bohoo* v. *Mirza Jehan Kudr*] - - - - - - - - 252

See "AWARD," 1.

"LIMITATION OF SUITS," 1, 3.

"MAHOMEDAN LAW."

PARTIES TO SUIT.

If the interest of the Mortgagor in the mortgage estate has been sold under a decree, and the sale takes place before the notice to foreclose was filed, such notice, to be effectual, must be served on the purchaser or decree-holder. [*Mohun Lall Sookool* v. *Goluck Chunder Dutt*] - - - - - - - - - 1

See "PLEADING," 4, 5.

PARTNERSHIP.

See "HINDOO LAW," 2, 3.

PARTITION.

See "RAZINAMAH."

PERPETUAL SETTLEMENT.

See "TENURE," 4.

PLEADING.

1. Technical rules not to be strictly observed in proceedings before the Judicial Agent of the *Madras* Government at *Ganjam*. [*Pakala Balakristnama Patrulu* v. *Sree Naraina Mardaraz Devu*] - 60
2. *Quære*, whether the rule of limitation in *Oude*, sec. 9 of Limitation, rules for the guidance of the Civil Courts, as a bar to a suit, can be entertained without being pleaded. [*Saligram* v. *Mirza Azim Ali Beg*] 114
3. Plea in bar, under *Ben.* Reg. III. of 1793, sec. 16, to suit, on the ground of *res judicata*. [*Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery*] - - 203
4. A summary suit was brought by *A.* against *B.*, to recover arrears of rent of certain *Mouzahs* alleged to be held by *B.* under a lease and *Kabooleat*. The defence by *B.* to the suit was a denial that the latter instrument had been executed by him, and he set up a title to the *Mouzahs* as being *Bhakee Birt* tenure. The Deputy Collector before whom the suit was tried, doubted the execution of the *Kabooleat* by *B.*, and dismissed the suit. *A.* then brought a regular suit against *B.*, seeking, first, to establish his proprietary title to the *Mouzahs* as *Zemindar*; secondly, to set aside the summary award; and thirdly, to recover arrears of rent under the lease and *Kabooleat*, when *B.* raised the same defence as in the summary suit. The *Sudder* Court nonsuited *A.* and dismissed the suit for multifariousness and misjoinder. Such decree reversed on appeal by the Judicial Committee, as, by the rules of pleading in *India*, a claim for rent in arrear, and to remove doubts in *A.*'s title as *Zemindar* to lease to *B.*, as raised by the defence, is not objectionable on the ground of multifariousness, but can be included in one plaint. [*Maharajah Rajundur Kishwur Sing, Bahadoor* v. *Sheopursun Misser*] - - - 438
5. A decree of the *Sudder* Court held, that although the title set up by the Plaintiff might be wholly bad, yet that a party Defendant with whom the Plaintiff had by a deed of *Solunamah*, or compromise, agreed to divide the estate, was entitled, and on that ground decreed possession. Such decree reversed on appeal, as the effect of the decree would be (1) to defeat the Defendant's possessory title without giving him an opportunity of contesting the title of the party by whom he is turned out of possession, and (2) as it was a violation of legal principles which protect possession, and of justice which regulate the joinder of parties and the union of titles to sue in one suit. [*Jowala Buksh* v. *Dharum Singh*] - - - - 511
6. By the procedure of the Courts in *India*, the Courts are bound to proceed according to the facts alleged in the plaint, and not to refuse to try issues of fact upon the merits, on the ground of the legal effect

of the facts alleged in the plaint. [*Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*] 540

POINTS

Recorded by the Court.

The provisions of *Ben.* Reg. XXVI. of 1814, sec. 10, cl. 3, directing the Court to record the points at issue, are imperative and must be strictly observed.

Where, therefore, in a suit to recover lands in possession, as the Plaintiff alleged, of the usufructuary Mortgagees under a conditional sale, the substantial question raised by the answer was, whether certain foreclosure proceedings under *Ben.* Reg. XVII. of 1806, sec. 8, taken by the Mortgagees, effectually barred the equity of redemption, but the Judge of the Court of First Instance did not record that point; upon appeal, the case was remitted by the Judicial Committee to *India*, with directions that the question of foreclosure should be tried upon an issue regularly settled. [*Mohun Lall Sookool* v. *Goluck Chunder Dutt*] - - - 1

POSSESSORY TITLE.

It is essential that a Claimant seeking to oust a party in possession of an estate, should establish his own right to the estate, and not rely upon the failure of the title impeached.

A decree of the *Sudder* Court held, that although the title set up by the Plaintiff might be wholly bad, yet that a party Defendant with whom the Plaintiff had by a deed of *Solunamah*, or compromise, agreed to divide the estate, was entitled, and on that ground decreed possession. Such decree reversed on appeal, as the effect of the decree would be (1) to defeat the Defendant's possessory title without giving him an opportunity of contesting the title of the party by whom he is turned out of possession, and (2) as it was a violation of legal principles which protect possession, and of justice which regulate the joinder of parties and the union of titles to sue in one suit. [*Jowala Buksh* v. *Dharum Singh*] - - - - - - - 511

POSSESSION.

It is the practice of the Courts in *India* not to give possession under a judicial sale by removing one who is in possession under an apparent *bonâ fide* title. As a debtor can only assert his title to possession by a suit, so a decree-holder who derives his title through him must assert his title by regular suit. [*Tarakant Banerjee* v. *Puddomoney Dossee*] - - - - - - - - 476

See "LEASE."

"LIMITATION OF SUITS," 3.

"PRACTICE," 5.

"TITLE," 1, 3.

POTTAH.

See "LEASE.

PRACTICE.

1. Upon special application, permission to appeal was granted in *December*, 1860, upon condition of the Appellant depositing with the Registrar of the Judicial Committee of the Privy Council the sum of £300, for costs. The record was transmitted from *India*, and the Respondent brought in his printed case, but the Appellant, though served with a peremptory notice, did not lodge his case or take any other step in the matter. In such circumstances, on application by the Respondent, the appeal was dismissed, and the Respondent's costs directed to be paid out of the sum deposited in the Council office, the balance to be returned to the Appellant. [*Gour Monee Debia* v. *Khajah Abdool Gunnee*] - - - - - - - - 59

2. By a decree of the *Sudder* Court at *Calcutta*, a suit was remanded to the *Zillah* Court, to be tried *de novo*. An appeal to *England* from this decree was refused, but upon special application was admitted by the Judicial Committee of the Privy Council; whereupon the Appellant applied to the High Court at *Calcutta* to stay proceedings pending the appeal to *England*, on the ground, that the decision of the appellate Court would govern the question at issue, which application that Court refused. The Appellant then presented a petition to Her Majesty in Council, and applied *ex parte* for the same relief, but the Judicial Committee, in the Respondent's absence, refused to make any order, though without prejudice to the Petitioner's further application when he had served the Respondent. [*Rajah Perladh Sein* v. *Baboo Bhoodoo Singh*] - - - - - 78

3. Upon a reversal of a decree of the *Sudder* Court, costs of the suit already paid by the Appellant ordered to be refunded, and the Court below directed to deal with those costs and all other costs, including those of the appeal, according to the result of the inquiry. [*Rajah Lelanund Singh, Bahadoor* v. *Maharajah Moheshur Singh, Bahadoor*] - - - - - - 81

4. A document being impeached, as being forged on the face of it, the case was directed to stand over for the original document to be transmitted from *India* for inspection at the hearing of the appeal. [*Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy, Bahadoor*] 123

5. Within six months after decree and prior to the admission of an appeal therefrom to *England*, the *Sudder Dewanny* Court, upon an *ex parte* application, without notice, issued an execution Order, putting the decree-holder in possession. This was done without calling for security, as provided by sec. 4, *Ben.* Reg. XVI. of 1797. The Appellant, on the admission of the appeal, applied to the *Sudder* Court for security from the party in possession pending the appeal, but that Court held that as the decree-holder was in possession under an

execution Order, which could not be appealed from, they had no power to interfere. On petition, the Judicial Committee, in the circumstances, and upon affidavit of waste, made an Order, declaring that it was competent to the *Sudder* Court to require security to be given for protection of the property pending the appeal, notwithstanding execution of the decreee had issued, and gave permission to the Appellant to apply to the *Sudder* Court with an intimation of that opinion. [*Mussumat Jariut-ool-Butool* v. *Mussumat Hoseinee Begum*] - - - - - - - - 196

6. Where a partial alteration was made by the appellate Court in the decree of the Court below, as to the rate of interest awarded, but in other respects the decree was affirmed, both parties were directed to pay their own costs of appeal. [*Murtunjoy Chuckerbutty* v. *Cockrane*] - - - - - - - - - 229

7. Special leave to appeal granted, notwithstanding that no application had been made for such leave to the Court below: upon the allegation, that though the amount decreed was made under the appealable value, the original demand being necessarily limited by the jurisdiction of the Court in which the suit was originally instituted, yet the subject-matter at issue exceeded in value the appealable amount. [*Mutusawmy Jagavera Yettapa Naiker* v. *Vencataswara Yettia*] - - - - - - - - 313

8. Application to stay proceedings in a cause in which an appeal from an Order in the nature of an interlocutory Order is pending before Her Majesty in Council, ought satisfactorily to show that a serious injury will be the result to the party applying, unless the delay asked for be granted, and that the party applying has come promptly to make the application.

Where, therefore, an Appellant from an Order of the High Court of Judicature which remitted a cause, appealed to that Court from the *Zillah* Court, back for the trial of issues framed in accordance with the provisions of Act, No. VIII. of 1859, sec. 139, having failed in obtaining an Order from the High Court to stay proceedings in the *Zillah* Court, pending the appeal, but not having appealed from that decision; presented a petition to Her Majesty in Council praying that all proceedings in the remanded suit might be stayed till the pending appeal had been heard; the Judicial Committee, without determining the question of their right to interfere in such circumstances, held that the Petitioner had not shown any such injury, or used such expedition, as entitled him to ask for a stay of proceedings.

Quære, whether, where an Order has been made by the Superior Court below, refusing to stay proceedings, and such Order is not specially appealed from, the Judicial Committee have any authority to interfere, though an appeal is pending before them from a previous Order

of the Superior Court made in the same suit, remitting the cause back to the inferior Court before which it is pending. [*Nawab Sidhee Nuzur Ally Khan* v. *Rajah Oojoodhyaram Khan*] - - - 322

9. It is not necessary to appeal from an interlocutory Order which does not dispose of the cause. Such Order can be impeached on appeal from the final decree. [*Forbes* v. *Ameeroonissa Begum*] - - - 340

10. A party is not bound to appeal from every interlocutory Order which is a step in the procedure that leads to a final decree. It is open on appeal from such final decree to question an interlocutory Order. [*Sheonath* v. *Ramnath*] 413

11. A slight modification of the decree of the Court below as to interest held not sufficient to deprive the Respondent of costs of appeal. [*Lalla Bunseedhur* v. *Koonwur Bindeseree Dutt Singh*] - - 454

12. The practice of including in the transcript Record, prepared and printed in *India*, under the Order in Council, 13th *June*, 1853, voluminous accounts and receipts, unnecessary to the question at issue, condemned.

Directions given in taxing costs to disallow all expenses occasioned by the insertion in the transcript of such unnecessary matters. [*Tarakant Bannerjee* v. *Puddomoney Dossee*] - - - - - - - 476

13. On appeal, the appellate Court was of opinion, that there was evidence from which the Court below ought to have awarded damages in respect of losses sustained by an illegal attachment. As the whole evidence was before the appellate Court, it was held that there was no necessity to remit the case to *India* for re-trial, and the Judicial Committee accordingly assessed the damages from the materials before them. [*Mudhun Mohun Doss* v. *Gokul Doss*] - - - - - - - - 563

PRESUMPTION

Of title arising from long possession.

See "TITLE," 1, 3.

PRESSURE

To induce party to execute a deed.

See "FRAUD."

PRINCIPAL AND AGENT.

A manufacturer of silks in *Bengal* employed a firm at *Calcutta* as Factors for the sale of his goods on commission. Generally the shipments and consignments to *England* were in the name of the Principal, but as the market was depressed at *Calcutta*, the Factors on several occasions shipped a portion of the goods to *England*, consigning them in their own names. There was a loss on the sales in *England* of the goods so consigned: Held, there being no peculiar custom of trade existing in *Calcutta* to qualify the general mercantile law of *England*, in respect to Principal and Factor; and in the absence of evidence of any special

instructions by the Principal, that such consignments by the Factors was within the scope of their general discretion, and the loss was properly charged on account of the Principal. [*Murtunjoy Chuckerbutty* v. *Cockrane*] - - - - - 229

PRIORITY.

A registered deed cannot be deprived of the priority given by the Act, No. XIX. of 1843, unless it be proved that there was fraud on the part of the grantee. [*Sreenanth Bhuttacharjee* v. *Ramcomul Gungopadya*] - - - - - - - 220

See "REGISTRATION."

PUNJAB CODE

Of 1854, introduced into Oude in 1856.

See "AWARD," 1.

"MAHOMEDAN LAW."

"OUDE."

REDEMPTION

(Equity of).

See "LEASE."

"MORTGAGE."

RAZINAMAH.

1. A *Razinamah* to compromise a suit, and a Bond arising out of the same transaction, recognizing a right to one-fourth of a *Talook*, declared null and void, as having been obtained by fraud and intimidation by the Manager of the Agent's Court at *Ganjam*, who used his official character as a pressure upon a *Zemindar* in difficulties in that District, to effect from him the execution of such instruments. [*Pakala Balakristnama Patrulu* v. *Sree Naraina Devu*] - - - 60

2. By a *Razinamah* executed in the year 1824, a compromise of a suit was entered into, whereby the respective rights of *A.* & *B.* in their father's (*C.'s*) real and personal estate were declared. *C.* was entitled to a tax levied on Pilgrims resorting to a Temple situate on his estate. This tax was abolished by Government in the year 1840, and a perpetual annual money payment awarded by the Government to *C.* as a compensation. On the death of *C.*, a partition of his estate was made between *A.* & *B.*, by assigning to each certain *Mehals* according to their supposed value, in respect of their proportions of the shares provided by the *Razinamah* of 1824 This partition did not include the compensation for the pilgrim-tax. Government, in dealing with the annual compensation-money, deducted the amount from the *jumma* paid by *A.* & *B.* for the *Mehals*, which led to disputes as to the value of the *Mehals* so taxed and apportioned between *A.* & *B.* Held (1), that the annual compensation-tax was to be treated as part of the assets of *C.*, and to be received by *A.* & *B.*, in the proportions agreed to by the *Razinamah*; and (2), that the mode of remission by Government from the *jumma*, in respect of the *Mehals*, by the appropriation of the

compensation-money, did not affect the rights of the parties. [*Maharanee Inderjeet Kooar* v. *Mussumath Ismudh Koonwur*] - - 329

RECORD.

Practice of inserting unnecessary documents in transcript prepared in *India* condemned. [*Tarakant Bannerjee* v. *Puddomoney Dossee*] 476

REGISTRATION.

By section 2 of Act, No. XIX. of 1843, it is enacted, that "every deed of sale, or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed—and that [from the 1st day of *May*, 1843] every deed of mortgage on land, houses, and other real property, as well as certificates of the discharge of such incumbrances, a memorial of which has been or shall be duly registered according to law, and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding." Held :—

First, that the words in the latter part of the section, "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding," applied not only to deeds and certificates of mortgage, but also to deeds of sale or gift; and

Secondly, that the proviso, that "its authenticity be established to the satisfaction of the Court," pointed out merely the exclusion of a fraudulent deed from the benefit of the Act, as it was not intended that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as a *bonâ fide* deed.

A registered deed cannot be deprived of the priority given by Act, No. XIX. of 1843, unless it be proved that there was fraud on the part of the grantee. [*Sreenanth Bhuttacharjee* v. *Ramcomul Gungopadya*] 220

RENT,

1. Suit for enhancement of.

See "TENURE," 2, 4.

2. For arrears of.

See "ASSESSMENT OF RENT."

"LIMITATION OF SUITS," 4.

RES JUDICATA.

Section 16 of *Ben.* Reg. III. of 1793 declares, "that the *Zillah* and City Courts are prohibited from entertaining any cause which, from the production of a former decree or the records of the Court, shall appear to have been heard and determined by any former Judge, or any Superintendent of a Court having competent jurisdiction." Held to apply only to a case in which the question to be determined in the suit was the same as had been already heard and decided, and not to a case where new circumstances had intervened and altered the nature and character of the question to be determined.

Money realized under a decree or judgment cannot be recovered back in a new suit or action, while such decree or judgment under which it was recovered remains in force, as the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by ulterior proceeding. [*Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery*] 203

RESUMPTION.

See "TENURE," 1.

SALE

1. Under a decree.

See "GUARDIAN AND WARD."
"MORTGAGE," 1.
"POSSESSION."

2. For Government for arrears of revenue.

See "TENURE," 2, 3, 4.

SECURITY

To prevent waste by party in possession, pending appeal to England. [*Mussumat Jariut-ool-Butool* v. *Mussumat Hoseinee Begum*] 196

See "PRACTICE," 5.

SECURITY FOR COSTS.

See "COSTS," 1.

SEPARATE ESTATE.

The presumption of Hindoo law is, that property not shown to be separated is joint, and the *onus probandi* lies on the party claiming is as separately acquired. [*Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry*] - - 403

See "HINDOO LAW," 2, 3.

SPECIAL APPEAL.

See "APPEAL," 1, 2, 3.

SPECIAL APPEAL TO THE SUDDER DEWANNY ADAWLUT.

Act, No. XVI. of 1853, c. 4, enacts, that no special appeal shall lie, nor shall any decision be reversed, altered, or remanded by any of the *Sudder* Courts upon the ground that the decision of any question of fact is contrary to, or not warranted by, evidence taken, or any probability deduced from the record. Held, that such enactment was to be carried to its full legitimate extent, except where the decree of the inferior Court is founded on an

inference of law, when a special appeal lies to the *Sudder Dewanny Adawlut*.

Thus when the Judge of the Inferior Court stated that the inclination of his opinion was, that there had been a sale, but that the Defendant could not rely upon that defence, because he had attempted to strengthen his case by a forged bill of sale, and that the estate, if not sold, must have been mortgaged, as insisted by the Plaintiff, and thereupon decided without proof that the estate was mortgaged; and such judgment was held not to be a finding of fact, but an inference of law, and analogous to a misdirection of a Judge to a jury, and, in such circumstances, a special appeal to the *Sudder Dewanny Adawlut* lies from such decree. [*Sevvaji Vijaya Raghunadha Valoji Kristnan Gopalar* v. *Chinna Nayana Chetti*] - - 151

SPECIAL DAMAGES.

See "DAMAGES."

SPECIFIC PERFORMANCE.

See "LEASE."

SPOLIATION OF BOOKS.

See "ACCOUNT," 8.

STAYING PROCEEDINGS

In Court below pending appeal.

See "PRACTICE," 2, 8.

SUB-TENURES.

1. Right of auction purchaser at Government sale for arrears of revenue to set aside sub-tenures. *Mouzahs*, forming a *Shikmee Talook* before the Decennial Settlement and held of the *Zemindar* by *Mocurrery* tenure at a fixed rent, are not liable to resumption by a purchaser under Reg. XI. of 1822, secs. 30, 32, and 33. [*Wise* v. *Bhoobun Moyee Debia Chowdrainee*] - - - - - - - - 165
2. *Talooks* held at a fixed and invariable rent anterior to the Decennial Settlement, and held not liable to enhancement of rent. [*Baboo Gopal Lall Thakoor* v. *Teluck Chunder Rai*] - - - - - 183

SUCCESSION

By Hindoo law.

See "HINDOO LAW," 1.

SUIT

For quit possession by lessee against lessor.

See "LEASE."

TAIL MALE.

See "HINDOO LAW," 1.

TANNAHDARY LANDS.

See "TENURE," 1.

TENURE.

1. *Chakeran* lands in *Bengal*, held anterior to the Decennial Settle-

ment, under the *Zemindar* of *Burdwan*, not merely in lieu of wages for personal services to the *Zemindar*, but also for the performance of the duties of village watchman, are not resumable as *Tannahdary* lands by the Government, under sec. 8, cl. 4, of *Ben.* Reg. I. of 1793, but are, by sec. 4 of *Ben.* Reg. VIII. of 1793, annexed to the *Malguzary* lands, and responsible for the public revenue assessed on the *Zemindury*.

Chowkeedars, or village watchmen, are liable to services to the *Talookdar*, but *Chakeran* lands held by them for such services are not liable to be resumed by the *Talookdar* for his own use discharged of the obligation to which they are subject. So held by the Judicial Committee, affirming the judgments of the *Zillah* and *Sudder* Courts, in a suit for resumption by the Appellant as *Talookdar*, under a purchase of certain lands from the *Zemindar* of *Burdwan*, which he alleged to be *Gram Surunjamee* (rent-free village lands), but which were proved to be *Chakeran* lands, appropriated to the maintenance of *Chowkeedars* in the *Talook* in which the lands were situate.

The right of appointing *Chowkeedars* belongs to the *Talookdar*, such officers being liable to the performance of services to the *Talookdar:* and as by usage in the *Zemindary* of *Burdwan*, *Chowkeedars* had been accustomed to render such services to the *Zemindar*, the *Chowkeedar* was held entitled to the possession of the *Chakeran* lands under such tenure. [*Joykishen Mookerjee* v. *The Collector of East Burdwan*] - - - - 16

2. Suit by a *Zemindar* against a mesne tenant of his *Zemindary*, holding by hereditary tenure, in the nature of a *Mouroosee Istemraree*, to enhance the rent of the lands which had been held by the tenant and his predecessors anterior to the Decennial Settlement at an invariable fixed rent, dismissed.

By section 5 of *Ben.* Reg. XLIV. of 1793, it is provided, that when a *Zemindary* is sold by public sale for discharge of arrears due from the *Zemindar*, or others, to Government, "all engagements which such proprietor shall have contracted with dependent *Talookdars*, whose *Talooks* may be situated in the lands sold, as also all the leases to under farmers and *Pottahs* to *Ryots* for the cultivation of the whole or any part of such lands (with the exception of the engagements, *Pottahs* and leases, specified in secs. 7 and 8), shall stand cancelled from the day of sale, and the purchaser, or purchasers, of the land shall be at liberty to collect from such dependent *Talookdar*, and from the *Ryots* or cultivators of the lands let in farm, and the lands not farmed, whatever the former proprietor would have been entitled to demand according to the established usages and rates of the *Pergunnah*, or District, in which such lands may be situated, had the engagements so cancelled never

existed." And the 7th section provides, that section 5 is not to authorize the assessment of any increase upon the lands of such dependent *Talookdars* as were exempted from increase by sec. 41 of Reg. VII. of 1793, at the Decennial Settlement of 1793.

In 1823, a *Zemindar* fell into arrears of revenue, and Government sold the *Zemindary* at a public sale for discharge of the arrears due, whereby the auction purchaser acquired such rights to cancel leases, &c., as then existed; but he took no steps under *Ben.* Reg. XI. of 1822, secs. 30, 32, 33, which gave power to a purchaser to cancel the leases, or to enhance the rent, nor was any claim in that respect made by subsequent purchasers from him, until the year 1856, when the *Zemindar* then in possession brought a suit to enhance the rent. Held, reversing the *Sudder* and *Zillah* Courts' decree:

First, that the tenure, a *Mouroosee Istemraree*, under which the Defendant held was hereditary, and as it had been uninterruptedly held anterior to the Decennial Settlement at a fixed rent, the *Zemindar* had no power to enhance the rent.

Secondly, that such a tenure was not cancelled, *ipso facto*, by the sale in 1823, as the language in sec. 7 of *Ben.* Reg. XLIV. of 1793 showed that what was intended by sec. 5 of that Regulation was not the destruction of the tenure, but the enhancement of rent, under certain specified and equitable limitations.

Whether such power is not confined to the auction purchaser himself and not to those claiming under him. *Quære.*

When false witnesses or forged documents are produced to support a case, such fact naturally creates suspicion; but if the appellate Court has to deal with a just case, though foolishly and wickedly attempted to be supported by false evidence, such circumstances will not prejudice the judgment on the merits, when the case is supported by independent evidence.

So ruled, when their Lordships were satisfied from the evidence that an ancient tenure existed, which was endeavoured to be supported by a forged document and evidence. [*Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy, Bahadoor*] 123

3. A purchaser of a *Zemindary* at a Government sale under *Ben.* Reg. XI. of 1822, to satisfy arrears of revenue, is entitled as purchaser, first, to immediate possession of such lands as were at the time of the sale in the possession of the *Zemindar;* and secondly, under secs. 30, 32, and 33 of that Regulation, to set aside by suit all subtenures created since the Decennial Settlement by the *Zemindar* last seized, or his predecessors.

Mouzahs, forming a *Shikmee Talook* before the Decennial Settlement and held of the *Zemindar* by

Mocurrery tenure at a fixed rent, are not liable to resumption by a purchaser under Reg. XI. of 1822, secs. 30, 32, and 33. [*Wise* v. *Bhoobun Moyee Debia Chowhrainee*] - - - - - - - - 165

4. Suits by a *Zemindar* claiming as purchaser at a sale for arrears of Government revenue, to enhance the rents of certain *Talooks*, which formerly constituted one *Talook*, held of the *Zemindary* at a fixed or *Mocurrery jumma;* dismissed by the *Sudder* Court, and such dismissal affirmed on appeal by the Judicial Committee, as the evidence established that each *Talookar* had paid a fixed and invariable rent anterior to the Decennial Settlement, and consequently was not liable to an enhancement of rent.

The *onus* of proving that a *Talook* had been held at a fixed and invariable rent twelve years antecedent to the Perpetual Settlement lies on the Defendant. [*Baboo Gopal Lall Thakoor* v. *Teluck Chunder Roy*] - - - - - 183

TESTAMENTARY

Instrument creating limitation in tail male.

See "HINDOO LAW," 1.

TITLE.

1. Disputes respecting the boundaries of the *Zemindaries* of *Yettiapooram* and *Ramnad*, in the District of *Madura*, having led to acts of violence by the *Ryots*, the Government, in the year 1836, to preserve the public peace, attached the disputed lands and took possession for the benefit of the party to whom the lands should be judicially awarded. At and before the time of the Government taking such possession, the *Zemindar* of *Yettiapooram* was in possession of certain lands adjacent to and taken as a part of the lands in dispute. The lands remained under attachment by Government for a period of nearly twenty years; no steps having been taken regarding them till the year 1855, when the *Zemindar* of *Yettiapooram* brought a suit against the Collector of *Madura* and the *Zemindar* of *Ramnad*, to recover possession of the land so formerly occupied by him, and for the mesne profits thereof while in the possession of the Government. Although no clear title in this suit was proved by either *Zemindar*, it was held by the Courts in *India*, and affirmed on appeal by the Judicial Committee, that the fact of possession of the lands by the *Zemindar* of *Yettiapooram* before and at the time of the attachment by the Government was, in the circumstances, evidence of title, and the Government was ordered to restore the lands to him. [*The Zemindar of Ramnad* v. *The Zemindar of Yettiapooram*] - 47

2. In a question of disputed boundaries the *onus probandi* lies upon the Plaintiff to prove by independent evidence his right to recover. But in the circumstances held, that the mere failure on the Plaintiff's

part to support the burden of proof cast upon him, as to part of the lands claimed, was not conclusive as it would be in ejectment, and the case remitted to *India* for further inquiries. [*Rajah Lelanund Singh, Bahadoor* v. *Maharajah Moheshur Singh, Bahadoor*] 81

3. Suit by *A.* to recover real estate in the possession of *B.* and of his predecessors, whose title has been unchallenged for forty-four years, on the ground that the estate was mortgaged only by *A.'s* ancestors, and that *B.* and those claiming under him were only usufructory mortgagees in possession. Held, that the *onus probandi* was on *A.*, who could only succeed by the strength of his own title, and not by reason of the weakness of *B.'s* title.

If a party put in evidence in support of his title, documents proved to be forged, but the other evidence adduced by him is not impeached, the Court, in rejecting the forged documents, will take the unimpeached evidence into consideration, and if satisfied, adjudicate thereon [*Sevvaji Vijaya Raghunadha Valoji Kristnan Gopalar* v. *Chinna Nayana Chetti*] 151

4. It is essential that a Claimant seeking to oust a party in possession of an estate, should establish his own right to the estate, and not rely upon the failure of the title impeached. [*Jowala Buksh* v. *Dharum Singh*]- - - - - 511

TORT.

See "DAMAGES."

TRANSCRIPT

Of record prepared in India.

See "PRACTICE," 12.

UNDIVIDED HINDOO FAMILY.

See "HINDOO LAW," 2, 3, 4.

USAGE.

See "PRINCIPAL AND AGENT."

"TENURE," 1.

USUFRUCTORY MORTGAGE.

See "MORTGAGE," 1.

"TITLE," 3.

VILLAGE WATCHMEN.

See "TENURE," 1.

WASTE.

Application for security from party in possession pending appeal.

See "PRACTICE," 5.

WIDOW.

1. What estate a Hindoo widow takes on death of her husband. [*Mussumat Moyee Debia* v. *Ram Kishore Acharj Chowdhry*] - - - - 279

2. Ordinary co-partnership property is not subject to the Hindoo Law which excludes a widow from the

succession at her husband's death to a share of the joint property of an undivided family.

The *Sudder* Court having established that the family was joint and the property undivided, awarded a gross sum out of the estate, calculated to make the widow of one of the brothers a monthly payment for maintenance. Held, that although a Court of Equity in this country would have set apart a certain sum to a separate account during the lifetime of the widow, yet from the want of machinery in the Native Courts in *India*, such practice could not be carried out. [*Rampershad Tewarry* v *Sheochurn Doss*] - - - - - - - - - 490

WILL.

See "EVIDENCE," 5.

"HINDOO LAW," 1.

ERRATA.

Page 65, *lines* 8 and 12 from top, for "Appellant" *read* "Respondent."
Page 69, *line* 29, for "Appellant" *read* "Respondent."

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